No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Forty-four million acres of Alaska land were conveyed to state-chartered, Native-owned corporations pursuant to the Alaska Native Claims Settlement Act of 1971 ("ANCSA" or "Act"). The respondent Native Village owns a 1.8 million-acre expanse of ANCSA land located in north-central Alaska. The Ninth Circuit held that this land is "Indian country" within the meaning of 18 U.S.C. § 1151(b), making respondent sovereign over a piece of Alaska about the size of the State of Delaware, overturning a fundamental jurisdictional premise upon which Alaska has been governed for more than a century, and rendering uncertain the jurisdiction of the State and the more than 225 Native villages occupying ANCSA land to govern vast areas of Alaska. The questions presented are:

1. Whether the Ninth Circuit correctly held—in conflict with the clear intent of Congress in enacting ANCSA, the decisions of the Alaska Supreme Court, and the interpretation of the federal agency charged with implementing ANCSA—that ANCSA land may constitute Indian country within § 1151(b).

2. If so, whether the Ninth Circuit correctly held—in conflict with the decisions of this Court and other federal circuits—that the determination whether land is Indian country within § 1151(b) should depend upon an *ad hoc*, six-part balancing test incapable of producing predictable results.

PARTIES TO THE PROCEEDINGS

Petitioner, plaintiff-appellee below, is the State of Alaska. It brought this action on its own behalf and on behalf of Yukon Flats School District, Unalakleet/Neeser Construction JV, Unalakleet Native Corporation, Neeser Construction Company, and Gerald Neeser. Yukon Flats School District is organized under state law, Alaska Stat. § 14.08.031, and administers public schools in north-central Alaska. The other entities are the joint venture, along with its principals, which contracted with the school district to construct a public school facility in Venetie. Under the contract the State assumed liability for taxes levied in connection with the project by an entity other than the State, federal government, or state municipality. *See* Am. Compl. for Decl. and Inj. Relief ¶¶ 1, 2, 14.

Respondents, defendants-appellants below, are the Native Village of Venetie Tribal Government, the Venetie Tax Court, the Venetie Tax Commission, Gideon James, Lawrence Roberts, Larry Williams, Ernest Erick, Lincoln Tritt, John Titus, and David Case. The individuals are tribal officers or members of the tax court or tax commission, who claim authority to collect the taxes at issue or to enforce them through judicial proceedings. They are sued in both their individual and official capacities. *See id.* ¶¶ 3-8. We refer to respondents collectively as the "Native Village of Venetie" or "Village."

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The State of Alaska petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit opinion is reported at 101 F.3d 1286 and reprinted in the appendix hereto ("App.") at 1a. That opinion reversed the order of the District Court for the District of Alaska on Indian country, which is unreported and reprinted at App. 37a. The District Court order on tribal status, which was not appealed, is unreported and reprinted at App. 80a. The Ninth Circuit opinion in the prior appeal is reported at 856 F.2d 1384 and reprinted at App. 127a. That opinion affirmed the District Court ruling granting a preliminary injunction, which is unreported and reprinted at App. 141a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1996. App. 1a. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on January 6, 1997. *Id.* 143a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Alaska Native Claims Settlement Act of 1971 ("ANCSA" or "Act"), 43 U.S.C. § 1601 *et seq.*, and 18 U.S.C. § 1151, are reprinted at App. 145a-172a.

INTRODUCTION

This case presents jurisdictional issues of extraordinary importance to the governance of this Nation's frontier state. It involves a dispute between the State of Alaska and the Native Village of Venetie over the basic question of which body is sovereign over a 1.8 million-acre expanse of land located in north-central Alaska, which was conveyed as part of the final settlement of aboriginal claims effected by ANCSA. The dispute arises from the Village's efforts to assess $161,000 in taxes upon a state contractor doing business in Venetie. It turns on whether Venetie is "Indian country" within the meaning of 18 U.S.C. § 1151, and, more particularly, whether it is a "dependent Indian community" within subsection (b) of that provision.[1]

Indian country is the jurisdictional touchstone for delineating federal, state, and tribal sovereignty over Indian-occupied lands. Within it Indian tribes have broad authority to tax and regulate the land as well as Indians and non-Indians who enter upon it. States, on the other

[1] Under 18 U.S.C. § 1151, land is Indian country if it is (a) an "Indian reservation," (b) a "dependent Indian communit[y]," or (c) an "Indian allotment." *Id.* This case concerns only the second type of Indian country.

hand, are precluded from exercising fundamental attributes of their sovereignty within Indian country, particularly in the areas of taxation and regulation. Since territorial times, Alaska has been governed on the basic jurisdictional premise—reinforced by the courts—that Indian country does *not* exist in Alaska, especially in the wake of ANCSA. That fundamental premise—affecting government operations at all levels—was obliterated by the Ninth Circuit below.

Overturning the Alaska District Court, a divided panel of the Ninth Circuit held that ANCSA land may constitute Indian country within § 1151(b). Then, applying an *ad hoc*, six-part balancing test, the panel ruled that the 1.8 million-acre Venetie tract *is* Indian country. In so ruling, the Ninth Circuit made the Native Village of Venetie sovereign over a piece of Alaska about the size of the State of Delaware. But that is perhaps the least of it. More than 40 million acres of Alaska land—an area on a scale with the *entire* area of Indian lands in the contiguous United States—are subject to ANCSA and are dispersed throughout the State.[2] The Ninth Circuit decision subjects that land to claims of Indian country status, calling into question the jurisdiction of the State to govern vast areas of Alaska.

This decision has enormous consequences for all of Alaska. As Judge Fernandez observed below, the Ninth Circuit decision invites "a blizzard of litigation throughout the State * * * as each and every tribe seeks to test the limits of its power over what it deems to be *its* Indian country," asserting "claims to freedom from state regulation, claims to regulate and tax for tribal purposes, assertions of sovereignty over vast areas of Alaska, and even assertions that tribes can regulate and tax the various corporations created to hold ANCSA land." App. 35a (emphasis added). Out of that "chaos" will emerge a

[2] A map of Alaska showing the lands conveyed under ANCSA—including Venetie—is reproduced at App. 173a.

"crazy quilt" of jurisdictional enclaves, crippling the State's ability to implement crucial state-wide regulatory programs—including fish and game, land use, and environmental programs. *Id.* 36a.

All of this, moreover, comes like a bolt out of the blue. The Ninth Circuit decision contravenes the clear intent of Congress in enacting ANCSA. It breaks ranks with the Alaska Supreme Court, which has held that "[t]here is not now and never has been an area of Alaska recognized as Indian country." *Native Village of Stevens* v. *Alaska Management & Planning*, 757 P.2d 32, 35 (Alaska 1988) (internal quotation marks omitted). And it completely ignores the views of the Department of the Interior—the agency charged with implementing ANCSA—which in 1993 issued a 133-page opinion categorically concluding that "[ANCSA] precludes the treatment of lands received under that Act as Indian country."[3] At the same time, the decision exacerbates a long-standing conflict among the federal circuits over the test for determining Indian country within § 1151(b), and—in fashioning a new, six-factor test—contravenes this Court's precedents establishing that jurisdictional rules in particular should be clear, easy to apply, and capable of producing predictable results.

Before Alaska is plunged into the chaos and confusion wrought by the Ninth Circuit decision, this Court should grant the writ and address the threshold jurisdictional questions presented.

STATEMENT OF THE CASE

1a. There are more than 225 Native villages in Alaska recognized as Indian tribes, scattered across a land mass about the size of Arizona, California, Oregon, Washington, and Montana—combined.[4] The members of the Native Village of Venetie—descendants of the Neets'aii Gwich'in—reside in the communities of Arctic Village and the Village of Venetie in north-central Alaska. In 1943 the federal government designated 1.8 million acres of land around these villages as a reservation. App. 2a. That reservation, however, was expressly revoked by ANCSA. 43 U.S.C. § 1618(a).

b. Congress passed ANCSA in 1971 to settle claims of aboriginal title in order to promote economic development and "maxim[ize] participation by Natives in decisions affecting their rights and property * * * without establishing a reservation system or lengthy wardship or trusteeship." *Id.* § 1601(a) & (b). The Act extinguished all aboriginal title to land and claims based on that title in exchange for some $962 million and 44 million acres of land (including subsurface rights), which were conveyed to more than 225 state-chartered regional and village corporations created under the Act, owned and operated by Natives as for-profit businesses subject to state law. *Id.* §§ 1606, 1607, 1611. By all accounts, ANCSA marked a dramatic break from prior federal Indian legislation. *See* App. 3a, 33a, 69a.[5]

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[3] Dep't of the Interior, Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers, Sol. Op. M-36975, p. 131 (Jan. 11, 1993) (hereinafter "DOI Op.").

[4] The following factual account is drawn primarily from the findings of the Alaska District Court below, which the Ninth Circuit "accept[ed] * * * without objection." App. 26a n.5. The lack of any factual dispute makes this case an ideal vehicle for addressing the important questions presented.

[5] *See also* DOI Op., p. 107 ("ANCSA * * * reflect[s] a new approach on an unprecedented scale in defining the relationship between Alaska Natives and the Federal Government"); Felix S. Cohen, Handbook on Federal Indian Law 740 (1982 ed.) ("[ANCSA] differs from usual models for resolving Indian claims and adjusting federal-Indian relationships in that it gives an extraordinary degree of control to Native people and Native operated institutions"); Blythe W. Marston, *Alaska Native Sovereignty: Testing the Limits of the "Tribe" and "Indian Country" Analysis*, 17 Cornell Int'l L. Rev. 375, 404 (1984) ("Congress intended ANCSA to be entirely different from previous Indian legislation");

c. Arctic Village and the Village of Venetie each established an ANCSA corporation. *Id.* 4a. In 1973 these corporations elected to take fee title to the 1.8 million-acre Venetie tract pursuant to 43 U.S.C. § 1618(b). Six years later, the corporations deeded this land to the Native Village of Venetie Tribal Government, then were dissolved. App. 4a. The Village thereupon asked the federal government to hold the land in trust, but the government refused to do so "in light of the clear expression of congressional intent in ANCSA *not* to create trusteeship or a reservation system." DOI Op., p. 112 n.276 (emphasis added). *See* App. 78a n.40. In 1980 the Village sought federal approval of an oil and gas exploration agreement between the Village and a private company, but the government rejected that request as well, reiterating that under ANCSA it has no trust relationship with Venetie. *See* note 16, *infra*.

The State funds and operates the public schools in Venetie, provides health care and law enforcement services to Village members, makes unemployment insurance payments to Village members, finances water, electricity, and other public utility projects, and funds and oversees various community projects. *Id.* 66a-67a & n.28, 74a. The Village also receives federal assistance, but, as the District Court found, that assistance "is now available in the form of grants and other programs which are administered by Native people themselves with general oversight by agencies as opposed to direct agency services to the tribe." *Id.* 66a-67a.

d. In 1978 the Village adopted a five percent gross receipts tax on businesses operating in Venetie. In 1986 the State, through the Yukon Flats School District, entered into a contract with a joint venture for the construction of a public school facility in the Village, to be financed with state funds. That same year the Village

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Nenana Fuel Co. v. *Native Village of Venetie*, 834 P.2d 1229, 1238-39 (Alaska 1992) (Moore, J., concurring).

replaced its gross receipts tax with a five percent business activity tax on "source gains" derived from commercial activities on its land. In December 1986 the Village notified the contractor that it owed $161,000 pursuant to this tax. When neither the contractor nor the State—"the party responsible for paying the tax" under the contract, *id.* 4a—paid the tax, the Village sought to collect it in tribal court from the State, the school district, and the contractor. *Id.*

2a. The State thereupon brought this federal action for declaratory and injunctive relief in the Alaska District Court, challenging the Village's jurisdiction to impose the tax. The Village moved to dismiss, arguing, *inter alia*, that, as an Indian tribe, it is entitled to tax non-Natives who engage in commercial activities in Venetie because the land is "Indian country" within 18 U.S.C. § 1151(b). The District Court rejected that motion and preliminarily enjoined the Village from attempting to collect the tax. App. 4a, 141a. The Ninth Circuit affirmed the preliminary injunction, observing that "in light of the large number of similar Native Alaskan communities in Alaska, this is a very important case raising far-reaching issues." *Id.* 140a.

b. On remand the District Court ruled in December 1994 that "the Neets'aii Gwich'in are a sovereign tribe as a matter of common law," and thus are entitled to govern their *own members*. *Id.* 126a.[6] That ruling was not appealed and is not at issue here. In August 1995, however, the District Court ruled that the 1.8 million-acre Venetie tract is *not* Indian country within 18 U.S.C.

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[6] Generally speaking, Indian tribes may govern their own internal affairs, and thus may "punish tribal offenders," "determine tribal membership," "regulate domestic relations," and "prescribe rules for inheritance for members." *Montana* v. *United States*, 450 U.S. 544, 564 (1981). Tribal jurisdiction to regulate land and the activities of non-members, however, turns on whether the tribes occupy Indian country. That is the nub of the dispute here.

§ 1151(b), and that, accordingly, the Village is not sovereign over the *land* and lacks authority to tax the commercial activities of non-Natives upon it. App. 79a.

Although it applied a four-factor test in reaching that result, *id.* 58a, the District Court focused on "the question of whether land has been validly set apart for the use of Indians as such, under superintendence of the government." *Id.* 49a. The court regarded these criteria —superintendence and set aside—as the critical factors in this Court's own Indian country cases, *see id.* 44a-49a, and found them "dispositive" of the case before it in the wake of ANCSA. *Id.* 57a n.15. *See id.* 59a.

The District Court concluded that "[s]uperintendence * * * exists for purposes of section 1151(b) where the degree of congressional and executive control over the tribe is so pervasive as to evidence an intention that the federal government, not the state, be the dominant political institution in the area." *Id.* 65a. The court ruled that such superintendence was plainly absent under ANCSA. *Id.* 67a-72a. The court reached the same conclusion as to the requisite set aside. ANCSA expressly revoked the Venetie reservation, and the land in question was not set apart by the federal government for the use of Indians as such, but rather was conveyed by it to state-chartered, ANCSA corporations to do with the land as they saw fit. *Id.* 70a, 77a-79a.

c. The Native Village of Venetie appealed, and a divided panel of the Ninth Circuit reversed. The panel adopted the District Court's factual findings, *id.* 26a n.5, but reversed its Indian country ruling, holding that "[ANCSA] did not extinguish Indian country in Alaska as a general matter, and that the land Venetie occupies is Indian country." *Id.* 2a.

The panel "reject[ed] the notion"—which "appeare[d] to be determinative in the district court"—"that federal supervision must be 'dominant' in order to satisfy the

superintendence prong of the Indian country test." *Id.* 20a. Instead, the panel concluded, "the litmus test of federal superintendence is whether the federal government has abandoned its trust responsibilities * * * clearly and explicitly." *Id.* 20a-21a. The panel also rejected the District Court's four-factor test for determining whether land constitutes Indian country, concluding instead that a "more textured *six*-factor inquiry" was required. *Id.* 12a (emphasis added).

Despite the fact that—as the panel put it—"ANCSA appears to implement, in no uncertain terms, a policy of Native self-determination that is fundamentally at odds with the paternalistic echoes of the trust relationship," *id.* 24a, the panel held that ANCSA failed the Ninth Circuit clear-statement rule. *Id.* 32a. In doing so, the panel ignored ANCSA's express extinguishment of claims based on aboriginal title, 43 U.S.C. § 1603(c), its revocation of Indian reservations, *id.* § 1618(a), and numerous other provisions of the Act. Having swept ANCSA to one side, the panel then proceeded—within the loosely worded contours of its multifaceted balancing test—to conclude that Venetie is Indian country within § 1151(b). App. 31a.

d. Judge Fernandez wrote separately. He shared the District Court view that "ANCSA was intended to be and was something very different." *Id.* 33a. Through ANCSA Congress sought "to separate the land * * * from the tribes themselves." *Id.* 34a. "The tribes would continue as sovereigns, but there would be no more Indian country because the land would not be set aside by the United States for use of the Indians as such," and "would [not] remain under the superintendence of the [federal] government." *Id.* 33a (internal quotation marks omitted). Thus, tribes could govern *themselves*, but "[a]s far as the land was concerned, the regular state and federal political entities would have and retain the necessary power." *Id.* 35a.

The panel opinion "confuse[d] matters by applying out-of-date theories to a truly new concept of Indian relationships and sovereignty." *Id.* Its result not only flouts congressional intent, but invites "a blizzard of litigation throughout the State of Alaska as each and every tribe seeks to test the limits of its power over what it deems to be its Indian country." *Id.* The aftermath: a "crazy quilt" of state and tribal jurisdictional enclaves in Alaska and precisely "the kind of chaos that the [ANCSA] Congress wisely sought to avoid." *Id.* 36a. Judge Fernandez nevertheless felt obliged to join the panel opinion in light of prior Ninth Circuit case law he found binding on the Indian country issue. *Id.*

On January 6, 1997, the Ninth Circuit denied the State's petition for rehearing. *Id.* 143a. Two weeks later, however, the court stayed its mandate until final disposition by this Court. *Id.* 142a.

REASONS FOR GRANTING THE WRIT

I. THE JURISDICTIONAL QUESTIONS PRESENTED ARE EXTRAORDINARILY IMPORTANT AND SHOULD BE DECIDED BY THIS COURT.

1. It is difficult to overstate the importance of this case. Its geographic magnitude, to begin with, is gigantic. The Ninth Circuit decision makes the respondent tribal government sovereign over a piece of Alaska roughly the size of Delaware. *See* App. 110a n.49. Yet the stakes are much higher. The decision below directly impacts the validity of state and tribal jurisdiction over the more than 40 million acres of land conveyed under ANCSA. While dispersed throughout the State, this land in the aggregate is larger than 32 of the individual states. It is, moreover, almost as large as the entire area of Indian lands in the contiguous United States, which totals some 56 million acres. DOI, *American Indian Today* 9 (3d ed. 1991). If permitted to stand, in other words, the Ninth Circuit

decision could nearly *double* the amount of Indian country in the United States.

This geographic magnitude alone is a compelling reason to grant the writ. In *Andrus* v. *Utah*, 446 U.S. 500, 506 (1980), for example, the Court explained that it granted certiorari "[b]ecause the dispute between the parties involves a significant issue regarding the disposition of vast amounts of public lands." The "vast amounts" of land involved in that case comprised some 571,000 acres, *id.* at 506 n.6—less than one-third the size of Venetie alone and a minuscule fraction of the tens of millions of acres of ANCSA land riding on this case. *See also Andrus* v. *Idaho*, 445 U.S. 715, 722 (1980) (certiorari granted to resolve status of "some 2.4 million acres of desert land within Idaho"); *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 42 (1983) (certiorari granted "[i]n view of the importance of the case to the administration of * * * more than 33 million acres of land").

2a. Yet it is not so much the geographic breadth of this case—but rather its jurisdictional significance—which makes it so important. Indian country is the jurisdictional touchstone for delineating federal, state, and tribal authority over Indian-occupied lands. *See Narragansett Indian Tribe* v. *Narragansett Elec. Co.*, 89 F.3d 908, 915 (1st Cir. 1996); Cohen, *supra*, at 27. Within it tribes possess broad authority—subject to federal limitations—to govern not only their own members, but also the land and nonmembers. States, on the other hand, are precluded from exercising fundamental attributes of their sovereignty within Indian country. *See New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *DeCoteau* v. *District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 & n.2 (1975).[7]

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[7] While most states are precluded from exercising criminal jurisdiction over Indians within Indian country, Public Law 280 grants six states—including Alaska—such jurisdiction. *See* 18 U.S.C.

Within Indian country, for example, state authority to regulate hunting and fishing, *New Mexico* v. *Mescalero Apache Tribe*, as well as gambling, *California* v. *Cabazon Band of Mission Indians*, is restricted. So too is state jurisdiction to tax Indian activities or property, *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 115 S. Ct. 2214 (1995), and even to tax non-Indians, *Ramah Navajo School Bd.* v. *Bureau of Revenue*, 458 U.S. 832 (1982). *See DeCoteau*, 420 U.S. at 427 n.2 ("[state] jurisdiction is quite limited" in Indian country). Tribes, on the other hand, not only have authority to regulate activities such as hunting and fishing, *Mescalero Apache Tribe*, and gambling, *Cabazon Band of Mission Indians*, even with respect to non-members, but have jurisdiction to zone property, *Brendale* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), and to tax Indian as well as non-Indian activities and property, *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

b. This division of government authority is novel and untried in Alaska. For more than a century the basic rule has been that there is *no* Indian country in Alaska, and thus no bar to the exercise of normal state jurisdiction over Native villages and lands. *See, e.g., Metlakatla Indian Community* v. *Egan*, 362 P.2d 901, 920 (Alaska 1961), *vacated on other grounds*, 369 U.S. 45 (1962); *United States* v. *Booth*, 161 F. Supp. 269 (D. Alaska 1958); *In re Sah Quah*, 31 F. 327 (D. Alaska 1886); *Kie* v. *United States*, 27 F. 351 (D. Or. 1886); *United States* v. *Seveloff*, 27 F. Cas. 1021 (D. Or. 1872); DOI Op., pp. 17-22; Report of the Governor's Task Force on Federal-State-Tribal Relations ("Governor's Report"), pp. 67-84 (Feb. 14, 1986). *See also* DOI Op. Regarding

§ 1162(a); Cohen, *supra*, at 286-287. Those states, however, still lack "general civil regulatory authority" over Indian country. *See California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 207-208 (1987).

Legal Status of Alaska Natives, 19 Pub. Lands Dec. 323, 325 (1894) ("Alaska is not Indian country"); Paul A. Matteoni, *Alaskan Native Indian Villages: The Question of Sovereign Rights*, 28 Santa Clara L. Rev. 875, 895 (1988) ("Case law has never recognized Indian country as existing in Alaska.").[8]

That understanding accords with the fact that, from the time of Russian rule, the history and treatment of Alaska Natives has always been fundamentally distinct from that of Indians in the lower 48 states. *See Egan*, 369 U.S. at 51-52; DOI Op., p. 4. Thus, for example, quite unlike the practice in the lower 48 states, there has always been "a broad application to Alaska Natives of, first, territorial law and, later, state law," Cohen, *supra*, at 763-764, which of course is flatly inconsistent with treatment of Alaska Natives as occupants of sovereign enclaves, or Indian country. *Accord Native Village of Stevens* v. *Alaska Management & Planning*, 757 P.2d at 35 (Alaska Natives are subject to state laws and taxes); Governor's Report, p. 128 ("from 1867 to the present, [Congress has presumed that] Alaska Natives

[8] Prior to this case, only one reported federal decision had recognized Indian country in Alaska. *In re McCord*, 151 F. Supp. 132 (D. Alaska 1957) (Moquawkie Indian Reserve at Tyonek). "That case has been narrowly construed and has never been followed in subsequent rulings." Matteoni, *supra*, at 896. It did, however, prompt a concerned Congress to include Alaska among the Public Law 280 states to ensure that state criminal law was not ousted from Tyonek. *See* DOI Op., p. 36. In an unpublished decision focusing on the tribal status of Chilkat Indian Village (or Klukwan), the district court observed without extended discussion that the village was Indian country. *Chilkat Indian Village* v. *Johnson*, No. J84-024 Civ. (D. Alaska Oct. 9, 1990). No court has relied upon that unpublished decision—which is entitled to little, if any, precedential weight, D. Alaska Local Rule 7.1(c); *Exxon Corp.* v. *Heinze*, 792 F. Supp. 72, 76 n.6 (D. Alaska 1992)—for the general proposition that Indian country exists in Alaska. The District Court below dismissed it, App. 76a-77a, and the Ninth Circuit did not even cite it.

living in Native villages were subject to the same civil and criminal laws as all other residents of the district, then territory, and now state of Alaska"); App. 73a-74a.

Following ANCSA, the federal and state governments have each reaffirmed the basic rule that Indian country does not exist in Alaska. *See* DOI Op., p. 132; Alaska Admin. Order No. 123 (Sept. 10, 1990); Alaska Admin. Order No. 125 (Aug. 16, 1991). In 1988—more than 15 years after ANCSA was passed—the Alaska Supreme Court did so, too. *Native Village of Stevens*, 757 P.2d at 35 ("There is not now and never has been an area of Alaska recognized as Indian country") (internal quotation marks omitted).[9] As respondents' own counsel have made clear, the Ninth Circuit decision obliterates that rule—along with the settled jurisdictional regime—by transforming virtually every Alaska Native village into Indian country, and thus displacing normal state jurisdiction in vast areas of the State. Native American Rights Fund ("NARF"), *Yes, There is Indian Country in Alaska*, 22 NARF Legal Rev. 1, 2 (Winter/Spring 1997) (Ninth Circuit "holding is not unique to Venetie and therefore, will apply to virtually all other Native villages, removing the barrier for other Alaska tribes to establish their Indian country status and jurisdiction.").

3a. This poses enormous regulatory problems for the State. For example, fish and game are vital environmental

[9] The *Stevens* court recognized as a "possible exception" the Moquawkie reserve considered in *In re McCord*. 757 P.2d at 35 & n.4. That reserve was revoked by ANCSA, however, along with the handful of other reserves that had been created in Alaska, save the Annette Island Reserve. 43 U.S.C. § 1618(a). The Annette Island Reserve, or Metlakatla, was established in 1891; it is distinct from all other Alaska Native communities in that its members are not Alaska Natives at all, but rather nineteenth century emigrants from British Columbia. As a result, Metlakatla was exempted from ANCSA. *See Atkinson* v. *Haldane*, 569 P.2d 151, 153-156 (Alaska 1977).

and economic state resources. Alaskans sought statehood in significant part to be able to regulate these resources themselves, went so far as to ensure protection for them in their constitution, Alaska const. art. VIII, § 4, and enacted a comprehensive regulatory scheme to preserve them, Alaska Stat. § 16; Alaska Admin. Code tit. 5. If ANCSA land constitutes Indian country, the State's authority to regulate hunting and fishing in vast areas of the State will be restricted and perhaps even precluded altogether. Moreover, because ANCSA land is dispersed throughout the State, and wildlife migrates without regard to jurisdictional boundaries, the Ninth Circuit ruling will prevent implementation of an effective, state-wide fish and game management scheme.[10]

The same goes for numerous other important state programs. For example, transformation of ANCSA lands into Indian country will thwart state regulation of forest practices, Alaska Stat. § 41.17, solid waste disposal, *id.* § 46.03.090, water quality, *id.* § 46.03.050, sewage treatment, *id.* § 46.03.720, and highways, *id.* § 19.10. It also opens a potentially enormous environmental compliance loophole, since state environmental controls are restricted or inapplicable in Indian country. *See Washington Dep't of Ecology* v. *EPA*, 752 F.2d 1465 (9th Cir. 1985) (state lacks jurisdiction within Indian country to impose

[10] This Court's own precedents underscore this threat. The Indian tribe in *New Mexico* v. *Mescalero Apache Tribe*, for example, had "undertaken a substantial development of the reservation's hunting and fishing resources" in order to attract tourism by arranging "package hunts" and other sporting activities. 462 U.S. at 327 & n.4. In doing so, the tribe adopted its own fish and game rules conflicting with the more stringent state regulatory scheme. *Id.* at 329. This Court held that the tribal rules preempted the state rules, even as to non-Indians. *Id.* at 344. *See also Montana* v. *United States*, 450 U.S. at 557 (tribes may bar non-members from hunting or fishing on Indian country, or "condition their entry by charging a fee or establishing bag and creel limits"). Millions of acres of ANCSA lands are prime fish and game areas.

environmental regulations). The federal Environmental Protection Agency has almost no presence in Alaska, and would be hard-pressed to regulate the hundreds of villages and vast areas comprising ANCSA lands, if existing state regulation were displaced.

b. Taxation—the particular assertion of sovereignty precipitating this action—presents additional problems. As the Ninth Circuit itself recognized, "[i]t is not unrealistic to conclude that a decision [in favor of the Village in this case] would add fuel to the engines of Native Alaskan taxation, and subject the State to a significant financial burden (as a result of paying the future levies or litigating their validity)." App. 136a. At the same time, tribal taxation will pose a significant impediment to future economic development in the State—which ANCSA was specifically designed to *promote, see* Cohen, *supra,* at 742—and, as the Ninth Circuit put it, "creates tremendous uncertainty and difficulty for the State and other businesses providing services to villages." App. 135a.[11]

Significantly, "the engines of Native Alaskan taxation" (*id.* 136a) also threaten the viability of ANCSA corporations themselves. The Village "assured [the Ninth Circuit] that tribes, as they see it, *do* have the power to tax and regulate the myriad of private corporations which received land under ANCSA." *Id.* 35a (emphasis added). As Judge Fernandez observed, that power not only would

[11] In 1986 the Native Village of Kluti Kaah—which occupies a tract of ANCSA land in south-central Alaska—claimed that it, too, occupies Indian country, and sought to tax the operator of the Trans-Alaska Pipeline, which passes near the village. Finding that the pipeline was subject to a special, federally created right-of-way, the Ninth Circuit exempted the pipeline corridor from Indian country status and rejected the village's pipeline tax. *See Alyeska Pipeline Serv. Co.* v. *Kluti Kaah Native Village,* 101 F.3d 610 (9th Cir. 1996). Under the Ninth Circuit Indian country regime, however, projects outside this discrete area would not enjoy such insulation.

give Native villages the ability "to control, regulate, and tax those corporations out of existence," but "would provide a fruitful area for *intertribal* conflict." *Id.* (emphasis added). Such efforts would—in plain derogation of ANCSA—gut the Act's hallmark corporate governance scheme, providing a graphic illustration of Chief Justice Marshall's famous maxim: "the power to tax involves the power to destroy." *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 431 (1819).

c. The most immediate problem wrought by the Ninth Circuit decision is the confusion and uncertainty it creates. In the wake of that decision, for example, the authority of state officials to investigate the taking of caribou or bear on ANCSA lands is unclear; businesses do not know if they will be subject to state or tribal taxation (or both) for activities on ANCSA lands; the application of state taxes and motor vehicle laws on ANCSA lands is unclear; state officials from school teachers to health officers to law enforcement agents do not know if they can be expelled from Native villages; and the thousands of non-Natives who presently reside in such villages do not know if they are subject to tribal laws and taxes. In practically every area of government, Alaskans—Native and non-Native alike—must now ask themselves the basic question: who is in charge?

The courts will be called upon to resolve that question in the countless instances in which it arises, subjecting the boundaries and extent of state jurisdiction to exercise fundamental government powers to the continuing federal oversight and micro-management of the Ninth Circuit, sitting thousands of miles away in California—a result which Congress certainly did not intend when it sought through ANCSA to settle Native claims "rapidly, with certainty, * * * [and] without litigation." 43 U.S.C. § 1601(b). Indeed, as Judge Fernandez observed: "There are hundreds of tribes, and the litigation permutations are as vast as the capacity of fine human minds can make

them." App. 35a. The resulting "chaos" (*id.* 36a) will be exacerbated by the Ninth Circuit's indeterminate, multi-faceted balancing test for determining the existence of Indian country. Sorting all this out in the courts will be a time-consuming, financially exhausting, and socially divisive endeavor for all concerned.[12]

The extraordinary importance of this case alone warrants granting the writ. S. Ct. Rule 10(c). As we explain next, however, this case also meets the other criteria for certiorari. S. Ct. Rule 10(a).

II. THE NINTH CIRCUIT HOLDING THAT ANCSA LAND MAY CONSTITUTE INDIAN COUNTRY CONFLICTS WITH THE CLEAR INTENT OF CONGRESS IN ENACTING ANCSA, THE DECISIONS OF THE ALASKA SUPREME COURT, AND THE INTERPRETATION OF THE FEDERAL AGENCY CHARGED WITH IMPLEMENTING ANCSA.

1. Congress has plenary authority over Indian affairs. *See McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973); *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73, 83-84 (1977). "Recognition or establishment of lands as Indian country," therefore, "is essentially a matter of the purpose of Congress and of

[12] According to respondents' own counsel, the Ninth Circuit ruling "will apply to virtually all other [Alaska] Native villages," altering the sovereign authority of those villages vis-a-vis the State and non-members. NARF, *supra*, at 2.

> The additional powers that tribes will have as a consequence of [the Ninth Circuit decision] include the authority to tax, zone, condemn real property, regulate land use, manage fish and game (although the extent of such authority is unclear)[,] exercise civil and criminal misdemeanor jurisdiction over tribal members, and under certain circumstances exercise civil jurisdiction over non-tribal members as well. In addition, a Tribe with "Indian country" status has the power to temporarily or even permanently expel from the community those who violate Tribal laws. [*Id.*]

the Executive Department in * * * enacting and carrying out statutes, and issuing executive orders." Cohen, *supra*, at 41. *See Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 125 (1993); Alaska Organic Act, ch. 53, § 8, 23 Stat. 24 (1884). Courts, in attempting to discern that purpose, have reached conflicting results as to whether ANCSA precludes the treatment of ANCSA lands as Indian country within § 1151(b). The executive department charged with implementing ANCSA—unlike the Ninth Circuit—has concluded that it does.

a. The four federal judges who have considered the threshold ANCSA question in this case split evenly. Both the Alaska District Court and Judge Fernandez concluded that Congress quite clearly intended to preclude designation of ANCSA lands as Indian country. *See* App. 33a-36a; 67a-71a. Numerous compelling textual indicia support that conclusion, including the Act's unequivocal declaration that it was designed to achieve its purposes "without establishing any permanent racially defined institutions" and "without creating a reservation system or lengthy wardship or trusteeship," 43 U.S.C. § 1601(b); its revocation of all Native reserves (save Metlakatla), *id.* § 1618(a); its conveyance of the land to state-chartered corporations subject to *state* law (including taxes), rather than setting it aside for tribes as such under federal superintendence, *id.* §§ 1606(d), 1607(a), 1620(d); and its extinguishment of all claims based on aboriginal title, use, or occupancy of land, *id.* § 1603(c), thus dissociating the land from any Indian country claims.[13]

[13] *See also* S. Conf. Rep. No. 581, 92d Cong., 1st Sess. 40 (1971) ("lands granted to Natives under this Act * * * are not 'in trust' and the Native villages are not Indian 'reservations' "); H.R. Conf. Rep. No. 746, 92d Cong., 1st Sess. 7 (1971) ("the conference committee does not intend that lands granted to Natives under this Act be considered 'Indian reservation' lands"); H.R. Rep. No. 523, 92d Cong., 1st Sess. 9 (1971) ("[ANCSA] does not establish

Judges Nelson and Browning, on the other hand, concluded that Congress had an entirely different regime in mind. They candidly acknowledged that "ANCSA appears to implement, in no uncertain terms, a policy of Native self-determination fundamentally at odds with the paternalistic echoes of the trust relationship." App. 24a. But—clinging to clear-statement rule upon clear-statement rule, *see id.* 14a-15a, 21a, 24a, 32a—they refused to conclude that the numerous textual indicia of Congress's intent to advance Native *self*-determination through ANCSA foreclosed judicial designation of ANCSA lands as *dependent* Indian communities, and thus Indian country, within § 1151(b). *See* App. 25a-26a.

b. But the conflict runs much deeper than this case. The Alaska state courts—like the Alaska District Court and Judge Fernandez below—have held that Congress in enacting ANCSA plainly sought to confirm rather than restrict state jurisdiction over ANCSA lands. In *Native Village of Stevens* v. *Alaska Management & Planning*, for example, the Alaska Supreme Court concluded that "[ANCSA] evidences Congress's intent that non-reservation villages be largely subject to *state* law." 757 P.2d at 41 (emphasis added).[14] That interpretation conflicts with the Ninth Circuit ruling, under which state law is rendered largely *inapplicable* within Native villages. It does, however, accord with Judge Fernandez's reading of ANCSA,

any trust relationship between the Federal government and the Natives").

[14] *See also Nenana Fuel Co.* v. *Native Village of Venetie*, 834 P.2d at 1239 ("ANCSA is * * * absolutely *inconsistent* with the concept that Alaska Native groups carry on as independent and sovereign enclaves entitled to special federal recognition") (Moore, J., concurring) (emphasis added); *id.* at 1242 (Under "ANCSA, the most far-reaching federal legislation ever to affect Alaska Natives, * * * Congress envisioned *state* regulatory authority over almost all Native-owned lands and Native corporations, and mandated involvement by the *state* in the affairs of all Native villages. Federal trusteeship and reservations were terminated.") (emphasis added).

under which, "[a]s far as the land was concerned, the regular state and federal political entities would have and retain the necessary power." App. 35a.

This conflict warrants plenary review. *See* S. Ct. Rule 10(a); *DeCoteau* v. *District County Court for Tenth Judicial Dist.*, 420 U.S. at 430-431 (certiorari granted "to resolve the conflict between the Supreme Court of South Dakota and the Court of Appeals for the Eighth Circuit as to the effect of the 1891 Act on South Dakota's * * * jurisdiction over [certain Indian lands]"). Indeed, the federal and state courts not only are split over the interpretation of an important federal statute, but their precedents now establish two entirely different jurisdictional regimes for Alaska: the Alaska Supreme Court does "not now and never has * * * recognize[d] * * * Indian country" in Alaska, *Native Village of Stevens* v. *Alaska Management & Planning*, 757 P.2d at 35; the Ninth Circuit not only does, but has earmarked tens of millions of acres of Alaska land for Indian country status. This Court should grant the writ to resolve this standoff.[15]

c. The conflict does not end there. In 1991 the Department of the Interior launched an exhaustive examination of the question whether ANCSA lands may constitute Indian country within § 1151(b). DOI Op., p. 1. Two years later—after consulting with members of Congress, state officials, and Alaska Natives, receiving comments and detailed legal briefs (including those filed by respondents in *this* case), *id.* at 3, 117-118 n.288, and probing the "history, law, and government policy toward Native

[15] The Alaska Supreme Court has made clear that it does not consider itself bound by Ninth Circuit precedent, including on questions of federal Indian law. *See In re F.P.*, 843 P.2d 1214, 1214-15 & n.1 (Alaska 1992) ("Where a federal question is involved, the courts of Alaska are not bound by the decisions of a federal court other than the United States Supreme Court") (internal quotation marks and citation omitted), *cert. denied*, 508 U.S. 950 (1993).

Alaskans," *id.* at 131—the chief legal officer of DOI issued a 133-page opinion, categorically concluding that:

> Congress clearly limited Native Village exercise of sovereign jurisdiction over [ANCSA] lands and nonmembers in a decisive fashion. *The statutory scheme established in ANCSA precludes the treatment of lands received under that Act as Indian country.* The purposes of ANCSA * * * would be frustrated by a determination that enclaves of federal and tribal jurisdiction continue to exist. [*Id.* at 131 (emphasis added).]

Coming from the federal agency charged with implementing ANCSA, 43 U.S.C. § 1624—and, indeed, with overseeing all Indian affairs, 25 U.S.C. § 2—that interpretation is entitled to "considerable deference." *Andrus* v. *Idaho*, 445 U.S. at 729. *Accord National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 417 (1992). Tellingly, the Ninth Circuit not only declined to accord the Department's interpretation any deference; it completely ignored it, even though it was argued by the State below. *See* C.A. Br. for Appellees, pp. 14, 16, 18, 43. Both the Alaska District Court and Judge Fernandez, on the other hand, recognized and relied upon that interpretation. *See* App. 33a, 69a n.32.[16]

[16] The Department's 1993 interpretation comports with its prior interpretations of ANCSA. As noted, DOI in 1978 rejected the Village's request to hold the land in trust, concluding that "in light of the clear expression of congressional intent in ANCSA *not* to create trusteeship or a reservation system, it would be an abuse of discretion for the Secretary to [do so]," DOI Op., p. 112 n.276 (emphasis added), and in 1980 rejected the Village's request for approval of an oil and gas development deal for similar reasons. *See* Letter from S. Keep, Acting Associate Solicitor, DOI, to Paul S. Williams, First Chief, Native Village of Venetie, *et al.*, p. 3 (Dec. 23, 1980). As the "contemporaneous view of the Executive Officer responsible for administering the statute," these interpretations are also "entitled to very great respect." *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 254 (1985) (internal quotation marks and citation omitted). *Accord Watt* v. *Alaska*, 451 U.S. 259, 272-273 (1981). The Ninth Circuit, however, ignored these views as well.

The direct conflict between the Ninth Circuit and DOI interpretations of ANCSA provides an alternative, independently compelling reason to grant the writ. *See Morton* v. *Ruiz*, 415 U.S. 199, 201-202 (1974) ("We granted certiorari because of the significance of the issue and because of the vigorous assertion that the judgment of the Court of Appeals was inconsistent with long-established policy of the Secretary [of DOI]"); *Patterson* v. *Lamb*, 329 U.S. 539, 541 (1947) (certiorari granted because lower court decision "upset twenty-five years of important War Department rulings and practices"). *See also Williams* v. *Lee*, 358 U.S. 217, 218 (1959) (certiorari granted because lower court decision "was a doubtful determination of the important question of state power over Indian affairs").

III. THE NINTH CIRCUIT DECISION DEEPENS THE CIRCUIT CONFLICT ON THE TEST FOR DETERMINING INDIAN COUNTRY AND CONFLICTS WITH THIS COURT'S PRECEDENTS.

1. Wholly apart from ANCSA, the Ninth Circuit decision deepens the conflict among the circuits over the test for determining Indian country within § 1151(b). This Court has said that Indian country is land "validly set apart for the use of the Indians as such, under the superintendence of the Government." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (internal quotation marks omitted). But, as the Ninth Circuit observed below, this Court "has never resolved * * * the test for determining whether a tribe constitutes a dependent Indian community within the meaning of § 1151(b)." App. 6a. In the absence of guidance from this Court, "[c]ourts have developed * * * distinctly different tests for deciding whether a given group of Indians constitutes a dependent Indian community for the purposes of federal law." *Schaghticoke*

Indians of Kent, Conn., Inc. v. *Potter*, 587 A.2d 139, 143 (Conn. 1991) (emphasis omitted).[17]

a. This case is emblematic of the conflict and confusion that persist in the lower courts on this important issue of federal Indian law. As noted, the District Court —while focusing on this Court's federal set aside and superintendence requirements—applied a four-factor test and held that Venetie is *not* a dependent Indian community. While it agreed that "a federal set aside and federal superintendence are the dominant factors of the dependent Indian community calculus," the Ninth Circuit concluded that the District Court's test was too "restrictive." App. 9a, 12a. Applying its "more textured six-factor inquiry," the Ninth Circuit reached the *opposite* result on the *same* set of undisputed facts. *Id.* 12a, 26a n.5.

The Ninth Circuit's test is a smorgasbord of the various factors developed by the circuits. *Id.* 6a-9a.[18] As the

[17] *See also Narragansett Indian Tribe* v. *Narragansett Elec. Co.*, 89 F.3d at 917 ("Exactly what constitutes a 'dependent Indian community' * * * has not been defined"); *Pittsburg & Midway Coal Mining Co.* v. *Watchman*, 52 F.3d 1531, 1545 (10th Cir. 1995) ("the Supreme Court has never adopted its own test for determining a dependent Indian community"); *Lewis* v. *Sac & Fox Tribe of Okla. Housing Auth.*, 896 P.2d 503, 513 (Okla. 1994) (discussing the different tests applied by the federal circuits), *cert. denied*, 116 S. Ct. 476 (1995); Matteoni, *supra*, at 887 n.71 ("no precise definition for a 'dependent Indian community' exists").

[18] The Tenth Circuit initially formulated a three-factor test, *see United States* v. *Martine*, 442 F.2d 1022, 1023-24 (10th Cir. 1971); *Blatchford* v. *Sullivan*, 904 F.2d 542, 546 (10th Cir. 1990), *cert. denied*, 498 U.S. 1035 (1991), which has been adopted by the Second Circuit. *See United States* v. *Cook*, 922 F.2d 1026, 1031 (2d Cir.), *cert. denied*, 500 U.S. 941 (1991). The Eighth Circuit applies a four-factor test, *see United States* v. *South Dakota*, 665 F.2d 837, 839 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982), which has been adopted by the First Circuit. *See Narragansett Indian Tribe*, 89 F.3d at 917. The Tenth Circuit recently embraced the Eighth Circuit's four-factor test, *see Pittsburg & Midway Coal Mining Co.* v. *Watchman*, 52 F.3d at 1545, even though other courts still follow the Tenth Circuit's three-factor test in *Martine*.

Ninth Circuit itself acknowledged, however, its test differs "significant[ly]" from "the test adopted by the First, Eighth, and Tenth Circuits [in] that [the Ninth Circuit] assess[es] the 'degree of federal ownership and control' over the area in question while the other circuits ask whether the United States retains 'title' to the land in question." App. 8a-9a. That conceded difference is itself largely outcome determinative in this case, since the Native Village of Venetie Tribal Government—not the federal government—holds fee title to the land at issue. *See Narragansett Indian Tribe* v. *Narragansett Elec. Co.*, 89 F.3d at 920-921 ("in most of the cases we found where land was privately held, even if by a tribe, the courts found that there was *not* a dependent Indian community") (citing Eighth and Tenth Circuit cases) (emphasis added).

The conflicting tests adopted by the lower courts have created enormous confusion on a matter of critical importance to the exercise of federal, state, and tribal sovereignty.[19] As this case illustrates, moreover, the conflicting tests may produce different results with respect to the same parcel of land, leaving the determination whether land is Indian country dependent upon the particular circuit in which it lies. The Court should grant certiorari and establish a uniform national rule for this threshold jurisdictional determination.

b. The circuits are split over even more fundamental features of the dependent Indian community test. For

[19] *See, e.g.*, William C. Canby, *American Indian Law* 99 (2d ed. 1988) ("The question of what is 'Indian country' has been even more troublesome than the question of who is an 'Indian' "); James E. Lobsenz, *"Dependent Indian Communities": A Search for a Twentieth Century Definition*, 24 Ariz. L. Rev. 1, 20-24 (1982) (existing tests "offer little guidance for recognizing 'dependent Indian communities' "); Richard W. Hughes, *Indian Law*, 18 N.M. L. Rev. 403, 459 (1988) ("courts have strained to develop from scratch various criteria for determining whether a particular community should be deemed a 'dependent Indian community,' without any consistent concept of what the term was intended to describe").

example, the Ninth Circuit decision squarely conflicts with *Narragansett Indian Tribe* v. *Narragansett Electric Co.*, in which the First Circuit adopted—verbatim—the superintendence standard applied by the Alaska District Court below, requiring "pervasive" federal involvement. 89 F.3d at 920 (quoting App. 65a).[20] Although the Indian community at issue in *Narragansett* received federal assistance and oversight, the First Circuit—like the Alaska District Court below—found the requisite superintendence lacking and thus concluded that the land was *not* Indian country within § 1151(b). 89 F.3d at 922.

The Ninth Circuit, however, expressly rejected the superintendence standard applied by the First Circuit in *Narragansett* (and by the Alaska District Court below), and, not surprisingly, reached the opposite conclusion as to the Indian country status of the land at issue. *See* App. 11a, 20a. Moreover, the Ninth Circuit based its conclusion that "Venetie has met the federal superintendence requirement of the dependent Indian community test" on the fact that it receives precisely the same type of federal assistance that the First Circuit found insufficient to establish a dependent Indian community in *Narragansett*. *Compare* App. 29a *with* 89 F.3d at 921-922.[21] *And* the Ninth Circuit even acknowledged that a different result

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[20] The Tenth Circuit applies a similar standard. *See Buzzard* v. *Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir.) ("Superintendency over the land requires the active involvement of the federal government."), *cert. denied*, 510 U.S. 994 (1993).

[21] In *Narragansett* the First Circuit held that the fact that the federal government "financed" the purchase of the Indian housing project, "provide[d] monies for the management of the project," and subsidized "nutrition, education and job training programs" for project members *failed* to establish federal superintendence. 89 F.3d at 918, 922. In this case, by contrast, the Ninth Circuit held that the fact that the federal government financed "a 29-unit housing project" and provided grants for the construction of similar community facilities *established* federal superintendence. App. 29a.

would obtain under the superintendence standard applied by the Alaska District Court and the First Circuit. *See* App. 28a.

The Ninth Circuit—in direct conflict with *Narragansett* and the decisions of other circuits[22]—has thus equated simple federal *assistance* with the requisite superintendence. The result is astonishing: the Ninth Circuit decision—in one fell swoop—greatly expands the dependent Indian community category of § 1151, transforming what had been a relatively minor adjunct to the traditional category of Indian reservations (§ 1151(a)) into a major form of Indian country nationwide, in direct conflict with the intent of Congress in enacting § 1151 and this Court's own precedents.[23]

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[22] *See, e.g., Narragansett*, 89 F.3d at 922 (tribe may not "obtain a valid claim to Indian country—and thus presumptive sovereignty rights—over theretofore privately-held lands just by purchasing them and obtaining financial and other assistance from the government for their development"); *Blatchford* v. *Sullivan*, 904 F.2d at 549 (no dependent Indian community where "[t]he federal government's relationship with the Yah-Ta-Hey community is not with the community qua community," but "[i]nstead, * * * with the * * * Indians who happen to live in the Yah-Ta-Hey area"); *Weddell* v. *Meierhenry*, 636 F.2d 211, 213 (8th Cir. 1980) ("it would be unwise to expand the definition of a dependent Indian community to include a locale merely because a small segment of the population consists of Indians receiving various forms of federal assistance"), *cert. denied*, 451 U.S. 941 (1981).

[23] As noted, there are about 56 million acres of Indian lands in the United States. Most of this land was "clearly designated" by Congress or the Executive "as reservations or as allotments, explicitly invoking the statutory terms." Cohen, *supra*, at 28. The Ninth Circuit decision makes 44 million acres of land—not so designated—eligible for *judicial* designation as Indian country. In doing so, it not only enlarges the dependent Indian community category of Indian country far beyond its originally intended scope, but makes the courts—not Congress or the Executive—responsible for allocating sovereign authority over vast areas of Alaska and, indeed, of the United States.

c. The dependent Indian community category of § 1151 traces its ancestry to *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913) and *United States* v. *McGowan*, 302 U.S. 535, 538 (1938). *See* 18 U.S.C. § 1151 (notes). While the Court did not define the phrase in either of those cases (and has not since), it took pains to emphasize that the Indian communities at issue were—quite unlike Venetie—basically entirely dependent on the federal government for their existence. *See* 231 U.S. at 40-45; 302 U.S. at 537 & n.5, 538-539. That conclusion was based in part on a degree of federal involvement that, as the District Court found, is absent in the wake of ANCSA.[24] It also rested on a perception—that Indians are "a simple, uninformed and inferior people," *Sandoval*, 231 U.S. at 39—which has been repudiated over time and, indeed, was disavowed by Congress in enacting ANCSA. *See* 43 U.S.C. § 1601; Lobsenz, *supra*, at 2 ("The 'quasi-sovereign' or 'dependent' status of the Indian tribe is inextricably linked to past concepts of the Indian as an uncivilized savage who was to be gradually elevated to the level of a civilized human being.").

2. On an even more elementary level, the Ninth Circuit decision conflicts with this Court's precedents establishing that jurisdictional tests should be clear, easy to apply, and capable of producing predictable results. *E.g.*, *Grubart* v. *Great Lakes Dredge & Dock Co.*, 115 S. Ct.

[24] In *McGowan* the Court emphasized that the Indian community in that case—a 28-acre colony owned by the federal government and set aside by it as a "permanent settlement" for the benefit of "needy Indians" across Nevada—"ha[d] been afforded the same protection by the government as that given Indians in other settlements known as 'reservations.'" 302 U.S. at 537. As the Court recognized in *Egan*, however, the history and treatment of Alaska Natives is fundamentally distinct from that of reservation Indians in the lower 48 states. 369 U.S. at 50-52. Moreover, ANCSA explicitly revoked the few reservations that were established in Alaska, except for Metlakatla, *see* 43 U.S.C. § 1618(a); note 9, *supra*, and Congress made clear that it did "not intend that lands granted to Natives under th[e] Act be considered 'Indian reservation' lands." H.R. Conf. Rep. No. 746, *supra*, at 7.

1043, 1055 (1995); *Sisson* v. *Ruby*, 497 U.S. 358, 364 n.2 (1990); *Burnham* v. *Superior Court of Cal.*, 495 U.S. 604, 626 (1990) (plurality opinion). As the Court recently explained in *Grubart*, multi-factor tests are "hard to apply," "jettison[] relative predictability for the open-ended rough-and-tumble of factors," and "invite[] complex argument in a trial court and a virtually inevitable appeal," all of which is especially unacceptable for threshold *jurisdictional* determinations. 115 S. Ct. at 1055. *See also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989) (discussing the theoretical and practical problems inherent in multi-factor balancing tests).

This Court recently invoked these principles in adhering to its largely "categorical" approach for determining state jurisdiction to tax within Indian country, which focuses on whether the legal incidence of the tax falls on Indians or non-Indians. *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 115 S. Ct. at 2220-21. In declining to adopt "a more venturesome approach," the Court explained that "a 'legal incidence' test * * * provide[s] a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority." *Id.* at 2221 (internal quotation marks omitted). It also promotes "predictability" and "safeguards against [the] risk of litigation" turning "upon a multiplicity of factors." *Id.* (internal quotation marks omitted). *See also Seymour* v. *Superintendent*, 368 U.S. 351, 358 (1962) (rejecting Indian country test that would result in "an impractical pattern of checkerboard jurisdiction" and "recreate confusion Congress specifically sought to avoid").

The Ninth Circuit's *six*-factor balancing test for determining whether land is Indian country within § 1151(b) is precisely the sort of "open-ended rough-and-tumble of factors" this Court has rejected. *Grubart*, 115 S. Ct. at

1055. As this case illustrates, the Ninth Circuit inquiry is exceedingly difficult to apply, promotes uncertainty rather than predictability, "invit[es] complex argument in a trial court and a virtually inevitable appeal," *id.*, and is easily manipulated to achieve desired results. *See* Matteoni, *supra,* at 400 n.147 (the "Indian country criteria are easily misformulated and misapplied * * * to justify desired results"). As Judge Fernandez observed, the Ninth Circuit test is a recipe for one thing and one thing alone—"chaos." App. 36a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 96-35042

STATE OF ALASKA *ex rel.* YUKON FLATS SCHOOL DISTRICT, UNALAKLEET/NEESER CONSTRUCTION JV, UNALAKLEET NATIVE CORPORATION, NEESER CONSTRUCTION COMPANY, and GERALD NEESER,
Plaintiffs-Appellees,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, a/k/a the NATIVE VILLAGE OF VENETIE, the VENETIE TAX COURT, the VENETIE TAX COMMISSION, GIDEON JAMES, LAWRENCE ROBERTS, LARRY WILLIAMS, ERNEST ERICK, LINCOLN TRITT, JOHN TITUS, and DAVID CASE,
Defendants-Appellants.

Appeal from the United States District Court
for the District of Alaska, H. Russel Holland,
District Judge, Presiding,
D.C. No. CV-87-00051-HRH

Argued and Submitted Oct. 7, 1996
Decided Nov. 20, 1996

Before: BROWNING, D. W. NELSON, and FERNANDEZ, Circuit Judges.

OPINION

D. W. NELSON, Circuit Judge:

The Native Village of Venetie Tribal Government appeals the district court's determination that the Alaska Native Claims Settlement Act extinguished Indian country in Alaska, and that the tribal government therefore lacks the authority to impose its Business Activities Tax upon a state contractor. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse the district court's judgment. We conclude that the Alaska Native Claims Settlement Act did not extinguish Indian country in Alaska as a general matter, and that the land Venetie occupies is Indian country.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from Venetie's attempt to impose its Business Activities Tax upon the Neeser Construction Company, which had been hired by the State of Alaska to build a new school in the village.

The Neets'aii Gwich'in—from whom nearly all of the inhabitants of Venetie descend—are a group of Alaska Natives that has historically inhabited an area consisting of the East Fork of the Chandalar River. In 1940, the Neets'aii Gwich'in adopted a constitution under the Indian Reorganization Act, 25 U.S.C. § 476. This constitution established the Native Village of Venetie as the governing authority of the Neets'aii Gwich'in. In 1943, the Secretary of the Interior created a reservation for the Neets'aii Gwich'in out of approximately 1.8 million acres surrounding Venetie. The Native Village of Venetie has governed this reserve since its creation. In 1976, the Native Village of Venetie restructured its council to include formal representation from Arctic Village (another community comprised of Neets'aii Gwich'in) and changed its name to the Native Village of Venetie Tribal Government ("Venetie").

In 1971, Congress passed the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601 et seq. ANCSA revoked "the various reserves set aside" for Alaska Natives by legislative or executive action, including the Venetie Reservation. 43 U.S.C. § 1618(a). In exchange, Congress authorized the transfer of $962.5 million and approximately 44 million acres of land to Native village and regional corporations created by the Act. 43 U.S.C. §§ 1606, 1607, 1611. These corporations were to be owned by Native shareholders residing in the corporations' respective geographical areas.

Announcing the goals of the Act, Congress declared that

> the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, [and] without creating a reservation system or lengthy wardship or trusteeship. . . .

43 U.S.C. § 1601(b). Congress clarified that ANCSA did not "relieve, replace, or diminish any obligation of the United States or of the State or [sic] Alaska to protect and promote the rights or welfare of Natives. . . ." 43 U.S.C. § 1601(c).

Congress enabled Native village corporations to opt out of ANCSA and to receive title in fee simple to their former reservation lands. 43 U.S.C. § 1618(b). Under this option, "any Village Corporation or Corporations may elect within two years [after the enactment of ANCSA] to acquire title to . . . any reserve set aside for the use or benefit of its stockholders or members prior to December 18, 1971." *Id.* Village corporations that exercised this option were not eligible to receive land or monetary distributions from the regional corporation.

Two Native villages were recognized by ANCSA within the boundaries of the former Venetie Reservation and two Native village corporations were thus established for the Neets'aii Gwich'in: one in Venetie (the Venetie Indian Corporation), and one in Arctic Village (the Neets'aii Corporation). In 1973, the shareholders of both corporations elected to opt out of ANCSA and to take title to their former reservation lands. The United States conveyed title to the former Venetie Reservation to the Venetie Indian Corporation and the Neets'aii Corporation as tenants in common.

In 1979, the tribal membership, acting through the Venetie Indian Corporation and the Neets'aii Corporation, transferred title to the former Venetie Reservation to Venetie. The shareholders then voted to dissolve the two Native village corporations. In 1981, the State of Alaska dissolved the corporations for non-payment of fees.

In 1986, Venetie enacted a Business Activities Tax, which imposed a five percent tax on "source gains" derived from commercial activities within the village. That same year, the State of Alaska, through the Yukon Flats School District, entered into a contract with the Neeser Construction Company for the construction of a school within the Native Village of Venetie.

In 1987, Venetie filed suit in the tribal tax court to collect taxes assessed against the Neeser Construction Company in the amount of $161,203.15. The State of Alaska, as the party responsible for paying the tax, refused to defend in tribal court and brought a federal action in the District of Alaska for declaratory and injunctive relief against the Tribe. The state claimed that the Tribe lacked jurisdiction to impose the tax. The district court issued a preliminary injunction enjoining the Tribe from further enforcement proceedings. The Ninth Circuit upheld this ruling. *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir.1988) (*Venetie I*). The *Venetie I* court held that the Tribe's authority to impose the tax upon non-members turned on whether Venetie is a federally recognized tribe and, if so, whether it inhabits Indian country. The court articulated a six-part test to guide the district court in its determination of the Indian country question.

On remand, the district court held that although Venetie is a tribe, it does not occupy Indian country as that term is defined by 18 U.S.C. § 1151. Applying its own four-part inquiry, the court determined that while Venetie was a dependent Indian community before 1971, Congress extinguished that status when it passed ANCSA.

Venetie's argument on appeal is in three parts. First, Venetie contends that the district court applied an unduly restrictive standard to determine whether the land at issue is Indian country. Second, Venetie argues that ANCSA did not extinguish Indian country in Alaska. Finally, Venetie asserts that it continues to occupy Indian country and therefore retains its inherent authority to tax activities occurring within its territory.

STANDARD OF REVIEW

The interpretation of a statute is a question of law reviewed de novo. *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 921 (9th Cir.), *cert. denied*, —— U.S. ——, 116 S.Ct. 337, 133 L.Ed.2d 236 (1995). The district court's factual findings are reviewed for clear error. Fed.R.Civ.P. 52(a); *United States v. American Prod. Indus., Inc.*, 58 F.3d 404, 407 (9th Cir.1995). Accordingly, the district court's determination that Venetie does not occupy Indian country as defined by 18 U.S.C. § 1151(b) is reviewed de novo, but the facts marshalled by the district court to support this determination are reviewed for clear error.

THE LEGAL STANDARD FOR DETERMINING WHETHER A TRIBE OCCUPIES INDIAN COUNTRY

The ultimate question presented by this case—whether Venetie has the authority to tax activities occurring within its territory—turns on whether Venetie occupies Indian country. *Venetie I*, 856 F.2d at 1390. To resolve this question, we must first establish the proper standard for determining whether Indian country exists in a given case.

Congress has defined Indian country as follows:

> "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all *dependent Indian communities* within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (emphasis added). This definition applies to both criminal and civil jurisdiction. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n. 5, 107 S.Ct. 1083, 1087 n. 5, 94 L.Ed.2d 244 (1987). Venetie occupies neither a reservation nor an allotment. Thus, we must establish the test for determining whether a tribe constitutes a dependent Indian community within the meaning of § 1151(b).

Although the Supreme Court has never resolved this narrow question, we do not write on a blank slate. A clear body of Court precedent emphasizes two central features of the inquiry into whether a given area constitutes Indian country, as a general matter: first, whether the territory is "validly set apart for the use of the Indians

as such," and second, whether the Natives who inhabit it are "under the superintendence of the [federal] Government." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511, 111 S.Ct. 905, 910, 112 L.Ed.2d 1112 (1991); *see United States v. John*, 437 U.S. 634, 649, 98 S.Ct. 2541, 2549, 57 L.Ed. 2d 489 (1978); *United States v. McGowan*, 302 U.S. 535, 539, 58 S.Ct. 286, 288, 82 L.Ed. 410 (1938); *United States v. Pelican*, 232 U.S. 442, 449. 34 S.Ct. 396, 399, 58 L.Ed. 676 (1914).[1]

Four circuits, including our own, have incorporated these two factors into more detailed approaches to the question of whether a Native group constitutes a dependent Indian community. Drawing upon the Eighth Circuit's decision in *United States v. South Dakota*, 665 F.2d 837 (8th Cir.1981), *cert. denied*, 459 U.S. 823, 103 S.Ct. 52, 74 L.Ed.2d 58 (1982), the First and Tenth Circuits have also adopted a multi-factored test to determine whether a tribe constitutes a dependent Indian community:

> [W]hether a particular geographical area is a dependent Indian community depends on a consideration of several factors. These include: (1) whether the United States has retained "title to the lands which it permits the Indians to occupy" and "authority to enact regulations and protective laws respecting this territory,"; (2) "the nature of the area in question, [(3)] the relationship of the inhabitants in the area to Indian tribes and to the federal government, and [(4)] the established practice of govern-

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[1] The district court noted that "it is not *land* but *Indians* which must be under the superintendence of the federal government." We agree. *Cf. John*, 437 U.S. at 649, 98 S.Ct. at 2549 ("The Mississippi lands in question here were declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians *who were at that time under federal supervision.*" (emphasis added)). The set-aside requirement adequately ensures that Indian country will not be found absent some federal connection to the land at issue.

> ment agencies toward the area,"; ([5]) whether there is "an element of cohesiveness . . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality;" and ([6]) "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples."

Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1545 (10th Cir.1995) (quoting *South Dakota*, 665 F.2d at 839 (citations omitted)); *see also Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co.*, 89 F.3d 908, 97-22 (1st Cir.1996). The Second Circuit has endorsed the threefold inquiry originally outlined in *United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir.1971), which consists of the three elements subsumed within the second prong of the *South Dakota* test. *See United States v. Cook*, 922 F.2d 1026, 1031 (2d Cir.), *cert. denied*, 500 U.S. 941, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991).

Relying upon *South Dakota* and *Martine*, we have suggested that an inquiry into whether a Native group qualifies as a dependent Indian community requires an analysis of six factors:

> (1) the nature of the area; (2) the relationship of the area inhabitants to Indian tribes and the federal government; and, (3) the established practice of government agencies toward that area; . . . . ([4]) the degree of federal ownership of and control over the area; ([5]) the degree of cohesiveness of the area inhabitants; and ([6]) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples.

Venetie I, 856 F.2d at 1391. The only significant difference between our suggested inquiry and the test adopted by the First, Eighth, and Tenth Circuits is that we assess the "degree of federal ownership and control" over the

area in question while the other circuits ask whether the United States retains "title" to the land in question.

In this case, the district court departed from our suggested six-part inquiry and carved out a new test that differs not only from *Venetie I* but from *South Dakota* and *Martine* as well. Relying primarily on *John* and *Potawatomi*, the court determined that the essential factors to be considered when assessing whether a dependent Indian community exists are whether "the Tribal Government holds land set apart for Alaska Natives as such," and whether "the Tribal Government is under the active supervision of the federal government." Indeed, the court concluded that a finding of a dependent Indian community *requires* a showing of these two factors, along with proof that the Native group in question is a tribe. The court listed two additional factors that could be considered to determine the extent, rather than the existence, of Indian country: "the nature of the area" and "the relationship of the area inhabitants to one another, to Indian tribes, and the federal government." The district court explained that the additional factors set forth in the circuit tests were "somewhat overlapping," and were subsumed in its new test.

We agree with the district court in this respect: a federal set aside and federal superintendence are the dominant factors of the dependent Indian community calculus. The most plausible reading of the caselaw supports the district court's approach. Although *John* and *Potawatomi* concerned reservation lands that would now fall under § 1151(a),[2] and *Pelican* concerned allotment land that

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[2] In both *Potawatomi* and *John*, the Supreme Court concluded that the territories in question were Indian country because they could be viewed as reservations, construed broadly, and not because they were dependent Indian communities. *John*, 437 U.S. at 648 n. 17, 98 S.Ct. at 2548 n. 17 ("Inasmuch as we find in the first category [§ 1151(a)—Reservations] a sufficient basis for the exercise of federal jurisdiction in this case, we need not consider the second and third categories [of § 1151]."); *Potawatomi*, 498

would now fall within the provisions of § 1151(c), we do not believe that courts should abandon the basic principles that have informed their analysis of Indian country for decades just because they are evaluating the status of an area that does not fit neatly into § 1151(a) or (c). Clearly, the Supreme Court has stressed the importance of an inquiry into whether tribal land was set aside by the federal government and whether the Natives who inhabit it are under the superintendence of the federal government. *See, e.g., Potawatomi,* 498 U.S. at 511, 111 S.Ct. at 910; *John,* 437 U.S. at 649, 98 S.Ct. at 2549. Indeed, in *McGowan,* a case concerning a dependent Indian community that was decided prior to the enactment of § 1151, the Court enunciated precisely these criteria. *McGowan,* 302 U.S. at 539, 58 S.Ct. at 288. Furthermore, numerous lower courts have emphasized these requirements. *See, e.g., Buzzard v. Oklahoma Tax Comm'n,* 992 F.2d 1073, 1076-77 (10th Cir.), *cert. denied,* 510 U.S. 994, 114 S.Ct. 555, 126 L.Ed.2d 456 (1993); *Blatchford v. Sullivan,* 904 F.2d 542, 548-49 (10th Cir.1990), *cert. denied,* 498 U.S. 1035, 111 S.Ct. 699, 112 L.Ed.2d 689 (1991); *Weddell v. Meierhenry,* 636 F.2d 211, 212-13 (8th Cir.1980), *cert. denied,* 451 U.S. 941, 101 S.Ct. 2024, 68 L.Ed.2d 329 (1981); *United States v. Adair,* 913 F.Supp. 1503, 1515 (E.D.Okla.1995); *United States v. Mound,* 477 F.Supp. 156, 160 (D.S.D.1979); *Youngbear v. Brewer,* 415 F.Supp. 807, 809 (N.D.Iowa 1976), *aff'd,* 549 F.2d 74 (8th Cir.1977).

Although we adopt federal set aside and superintendence as prerequisites to the existence of a dependent Indian community, we believe that these requirements should be construed broadly. This construction accords with the Supreme Court cases upon which § 1151 is based, *see* Reviser's Note, 1948 Act, 18 U.S.C.A. § 1151: *United States v. Sandoval,* 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107

U.S. at 511, 111 S.Ct. at 910 ("As in *John,* we find that this trust land is 'validly set apart' and thus qualifies as a reservation for tribal immunity purposes.").

(1913), and *McGowan,* 302 U.S. at 539, 58 S.Ct. at 288. Both cases eschewed a formalistic assessment of the status of tribal land and adopted a more functional approach to the problem of Indian country that focuses on dependence as the primary consideration. For example, in *Sandoval* the Court held that Congress possessed the power to designate lands held in fee by the Pueblo as Indian country. Congress neither had conferred the lands to the Pueblo, nor held them in trust; rather, they were held in fee under land grants from the King of Spain. Thus, *Sandoval* suggests that the fact that a tribe holds title to land in fee simple, without any restrictions on alienation imposed by the federal government, should not in itself preclude a finding that the land was "set aside" by the government. A per se refusal to construe fee land as Indian country would conflict with *Sandoval,* 231 U.S. at 48, 34 S.Ct. at 6; *see Narragansett,* 89 F.3d at 918. While *Sandoval* is not inconsistent with a general set-aside requirement, it suggests that a set aside can include land held in fee when Congress designates that land as Indian country.

Likewise, federal superintendence should be interpreted broadly. We cannot agree with the district court's requirement that federal superintendence must be "pervasive," meaning that it be the "dominant political institution" in the area as compared to the state. There is no precedent to support narrowing the federal superintendence requirement in this manner. Proof that federal superintendence is "pervasive" has never been required by the Supreme Court. To the contrary, the Court indicated in *John* that unchallenged state jurisdiction and noncontinuous federal supervision do not eliminate Indian country. 437 U.S. at 652-53, 98 S.Ct. at 2550-51; *see also Indian Country, U.S.A. v. Oklahoma Tax Comm'n,* 829 F.2d 967, 974 (10th Cir.1987), *cert. denied,* 487 U.S. 1218, 108 S.Ct. 2870, 101 L.Ed.2d 906 (1988); *South Dakota,* 665 F.2d at 842 (citing *John,* 437 U.S. at 653, 98 S.Ct. at 2551).

Having determined that a federal set aside and federal superintendence are required elements of a dependent In-

dian community, and that these requirements should be broadly construed, we must also consider whether the district court erred when it replaced the six-factor inquiry suggested by this court in *Venetie I* with its own four-part test.

The purpose of developing a multi-factored analysis is not to calcify the Indian country inquiry by erecting a complicated set of prerequisites to the establishment of a dependent Indian community. Rather, the multi-factored inquiry suggested by *Venetie I* and modified by the district court is intended to illuminate the "factually dependent" inquiry into whether those requirements have been met. *See Venetie I*, 856 F.2d at 1391. We must guide lower courts as they seek to provide meaning to the general notions of set aside and superintendence. We conclude that the functional approach to Indian country suggested by *Sandoval* and *McGowan* recommends the more textured six-factor inquiry presented by this court in *Venetie I* and adopted by three other circuits, *see Narragansett*, 89 F.3d at 917-22; *Pittsburg*, 52 F.3d at 1545; *South Dakota*, 665 F.2d at 839, over the more restrictive four-prong test advanced by the district court.

Having explained the purpose of the multi-factored inquiry, it is not surprising to find that the factors set forth in our six-part test overlap considerably. For example, the inquiry into the "practice of government agencies toward the area" (third factor in *Venetie I*) may be subsumed within the larger principle of federal superintendence. And the inquiry into the "degree of federal ownership and control" (fourth factor in *Venetie I*) falls within the set-aside inquiry. Indeed, all six factors listed in the *Venetie I* decision could be construed to fit within the two fundamental elements of a dependent Indian community. Likewise, the two additional factors that the district court chose to leave in place—"the nature of the area" and "the relationship of the area inhabitants to one another, to Indian tribes, and the federal government"—

fall under the general rubric of set aside and superintendence, respectively. Because we believe that a functional inquiry into federal set aside and superintendence is better facilitated by a consideration of a wide range of factors, we embrace the six-factor analysis that was suggested in *Venetie I* and which is virtually identical to the approach adopted by three other circuits. *See Narragansett*, 89 F.3d at 917-22; *Pittsburg*, 52 F.3d at 1545; *South Dakota*, 665 F.2d at 839.

In sum, we hold that a dependent Indian community requires a showing of federal set aside and federal superintendence. These requirements are to be construed broadly and should be informed in the particular case by a consideration of the following factors:

> (1) the nature of the area; (2) the relationship of the area inhabitants to Indian tribes and the federal government; (3) the established practice of government agencies toward that area; (4) the degree of federal ownership of and control over the area; (5) the degree of cohesiveness of the area inhabitants; and (6) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples.

DID ANCSA EXTINGUISH INDIAN COUNTRY IN ALASKA?

We proceed to apply this standard to discern whether the Alaska Native Claims Settlement Act extinguished Indian country in Alaska. Our analysis focuses on federal set aside and federal superintendence because they are the factors that are most relevant to an analysis of the effect of a general statute such as ANCSA. The additional factors that we have adopted above become significant when analyzing whether a specific parcel of land qualifies as Indian country. For example, the cohesiveness of the community and the nature of the area at issue

become intelligible factors only once the level of inquiry moves from general statutory provisions to specific territorial claims. Accordingly, the following analysis of ANCSA focuses on set aside and superintendence generally. When we proceed to answer the ultimate question of whether Venetie occupies Indian country, we will illuminate this general inquiry by considering the additional factors of our six-part test.

A. *Canons of Construction*

We begin by emphasizing the fundamental principle that statutes affecting Indian rights "are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918); *see also Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257 (9th Cir.1994); *McNabb v. Bowen*, 829 F.2d 787, 792 (9th Cir.1987). This canon of construction derives from the trust relationship that exists between the federal government and Native Americans. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831). "Since Congress is exercising a trust responsibility when dealing with Indians, courts presume that Congress' intent toward them is benevolent and have developed canons of construction that treaties and other federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians." Felix S. Cohen, *Handbook of Federal Indian Law* 221 (1982 ed.). Among these canons is the rule that Congress's intent to abrogate Indian rights must be indicated by a "clear and plain statement." *See id.* at 224.

ANCSA falls into that category of statutes enacted for the benefit of Indians. Therefore, it should be liberally construed, and "doubtful expressions [should be] resolved in favor of the Indians." *Alaska Pacific Fisheries*, 248 U.S. at 89, 39 S.Ct. at 42. Specifically, congressional

intent to extinguish Indian country must be reflected by "clear and plain" language. *United States v. Sante Fe Pac. R.R. Co.*, 314 U.S. 339, 353, 62 S.Ct. 248, 255, 86 L.Ed. 260 (1941). It is with this background principle in mind that we consider the effect of ANCSA.

B. *Federal Set Aside*

There is no question that Congress set aside land for specific Native entities when it enacted ANCSA. The only question is whether Congress set aside ANCSA land for Alaska Natives, as such. We believe that the village corporations established under ANCSA, while business entities, maintain a distinctly Native identity. Accordingly, we conclude that land set aside for such corporations qualifies as land set aside for Alaska Natives, as such.

The district court determined that the corporate model of Native land ownership established under ANCSA precluded a finding that the federal government had set aside the land at issue for the use of Alaska Natives. The court concluded that the corporate model of land ownership dictated by the Act evinced a congressional intent to treat Alaska Natives as ordinary business entities—not Natives, "as such."

We disagree. First, the corporations established under ANCSA differ markedly from ordinary business corporations. Natives own and manage the corporations. Under the original statute, membership in the corporations was restricted to Natives for 20 years, 43 U.S.C. § 1606(h)(1), and the 1987 Amendments allow each corporation to extend this restriction indefinitely. Alaska Native Claims Settlement Act Amendments of 1987, Pub.L. No. 100-241 (1987) (codified at 43 U.S.C. § 1629c). In addition, the Act provides for each village corporation to be comprised of Natives from a particular Native village, each an existing Native political and cultural entity. 43 U.S.C.

§ 1607(a). Indeed, under the Act each village corporation gained at a minimum the surface estate to the very land on which the particular Native village was situated. 43 U.S.C. § 1611(a)(1) (conferring on each local corporation the right to select "all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled"). Accordingly, the land grants under the Act were far different from mere distributions made to business entities on the basis of monetary value. Rather, they were informed by Natives' historical ties to the lands they inhabit.

Second, the statute suggests that the local corporations are the instruments of, and owe obligations to, the Native villages. The Act defines each village corporation as charged with the responsibility of managing assets "for and on behalf of a Native village. . . ." 43 U.S.C. § 1602(j).

Third, the significant protections of Native land offered by ANCSA and its amendments indicate the extraordinary character of these "business" corporations. Under the original version of the Act, the corporations enjoyed nearly a complete exemption from the requirements of the federal securities laws until 1991, 43 U.S.C. § 1625 (original version of statute), as well as immunity from state and local property taxes on undeveloped land, 43 U.S.C. § 1620 (original version of statute). The 1987 Amendments enabled the corporations to extend the former exemption. Pub.L. No. 100-241 (1987) (codified at 43 U.S.C. § 1625).

The Alaska National Interest Lands Conservation Act ("ANILCA"), Pub.L. No. 96-487 (1980) (codified at 16 U.S.C. §§ 3101-3233, 43 U.S.C. §§ 1606, 1631-41), has provided further protections to Native land. ANILCA permitted Native corporations to place their undeveloped lands in a "land bank," which entitles them to tax benefits, 43 U.S.C. § 1636. Specifically, in exchange for placing a moratorium on development and sale of the "banked" land, and agreeing to manage the land in accordance with federal requirements, the corporations qualify for federal and state property tax immunity. 43 U.S.C. § 1636.[a]

Finally, the restrictions on Native corporation stock provided by ANCSA indicate the special character of these corporations. At the election of the corporation, its stock may not be alienated, 43 U.S.C. § 1606(h)(1)(B)(vi), and voting rights may be limited to Native stockholders, 43 U.S.C. §§ 1606(h)(2)(C). Even where the corporation elects to lift restrictions on alienation, it may still restrict voting rights to Native stockholders. 43 U.S.C. § 1606(h)(3)(D)(i). Native corporations may also amend their bylaws to give the corporation the right to buy any stock offered for sale by a stockholder, 43 U.S.C. § 1606(h)(3)(D)(ii), and the right of first refusal on any shares transferred to a non-Native pursuant to intestate succession, 43 U.S.C. § 1606(h)(2)(B).

In reaching its conclusion that ANCSA lands were not set aside for Alaska Natives as such, the district court also emphasized ANCSA's provision for Native ownership of land in fee. It is true that in spite of the protections described above, the lands selected by the Natives under ANCSA are freely alienable, unless the Natives elect to seek the shelter of the ANILCA "land bank."

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[a] The fact that all private landowners, and not just Native corporations, are eligible for benefits under ANILCA is not significant. Only private owners of land adjacent to or directly affecting federal or state lands are eligible. 43 U.S.C. § 1636(a)(1). Even more important, Native corporations receive greater benefits than other landowners—only Native corporations are entitled to tax immunity, 43 U.S.C. § 1636(c)(2). These protections not only evince a congressional intent to preserve a protective relationship with Alaska Natives, one which continues a policy of federal superintendence, *see infra*, but they also suggest that Congress meant to "set aside" the land specifically for the use of Natives, as such.

But the mere fact that Alaska Natives hold title to the land in fee does not preclude a finding that Congress set aside the lands for their use and occupancy. Refusal to treat a Native group as a dependent Indian community simply because it owned land in fee would conflict with one of the seminal cases on the subject, *Sandoval*, 231 U.S. at 48, 34 S.Ct. at 6. Such a rule would also violate principles articulated by the Supreme Court in another early Indian country case, *United States v. Chavez*, 290 U.S. 357, 364, 54 S.Ct. 217, 220, 78 L.Ed. 360 (1933). There, the Court stated that Indian country includes "*any* unceded lands *owned* or occupied by an Indian nation or tribe." *Id.* (emphasis added).

The Tenth Circuit has considered several cases raising this issue and has concluded that mere fee ownership does not prevent Native-owned land from qualifying as Indian country. In *Indian Country, U.S.A.*, 829 F.2d at 973, the Tenth Circuit held that land owned by the Creek Nation is Indian country, even though it is neither on a reservation nor on land held in trust by the federal government. The court concluded that "it would be anomalous to adopt the State's position suggesting that the treaties conferring upon the Creek Nation a title *stronger* than the right of occupancy have left the tribal land base with *less* protection, simply because fee title is not formally held by the United States in trust for the tribe." *Id.* at 975-76. The First Circuit has drawn a similar conclusion. *Narragansett*, 89 F.3d at 918.

These cases suggest that the purpose of the set-aside requirement is to ensure that Native groups do not unilaterally claim rights over Indian country by requiring that Congress at least recognize or designate the land at issue for Native use. On these grounds, the argument that the government set aside the land is stronger in this case than it is in either *Sandoval* or *Martine*, where the Tribes acquired fee title from entities other than the government. Here, Congress specifically has conferred the land at issue on the Natives by statute. We hold that this satisfies the set-aside requirement.

C. *Federal Superintendence*

The superintendence requirement of the dependent Indian community test is designed to determine the extent to which the traditional trust relationship between the federal government and Native Americans remains intact in a particular case. There is no hard and fast rule for determining how involved the trust relationship must be to constitute the requisite level of superintendence.

Before the passage of ANCSA, Alaska Natives were thought to be under the guardianship of the United States and were entitled to the benefits of this special relationship. *See Alaska Pacific Fisheries Co.*, 248 U.S. at 88, 39 S.Ct. at 41; *Pence v. Kleppe*, 529 F.2d 135, 138 n. 5 (9th Cir.1976); Cohen, *supra*, at 739. We believe that this trust relationship survived the passage of ANCSA. This circuit "appears to recognize a federal trust responsibility comparable to that toward other Indians, even after passage of the Alaska Native Claims Settlement Act." William Canby, *American Indian Law* 274-75 (2d ed. 1988) (citing *Alaska Chapter, Associated General Contractors v. Pierce*, 694 F.2d 1162, 1168-69 n. 10 (9th Cir.1982)).

The district court found that ANCSA "effected a significant change in relationship as between the federal government and Alaska Natives." The court emphasized that the corporate model introduced by ANCSA constituted "a significant diminution of the power of Congress and the Executive agencies over Alaska Native tribes," and that Congress's policy in enacting ANCSA "strongly suggests a shift from government superintendence to self regulation." The district court concluded that "[t]he federal government no longer exercises that level of *active*

superintendence necessary to evidence an intent to be the *dominant* political institution in the area in question to the exclusion of the state."

As a threshold matter, we reject the notion that federal supervision must be "dominant" in order to satisfy the superintendence prong of the Indian country test. This "dominant" standard appears to have been determinative in the district court: the court relied on the introduction of state control over Native corporations to support its conclusion that federal superintendence had been displaced by ANCSA. But the introduction of state supervision over certain aspects of Indian life does not eviscerate Indian country. "[A]t times Congress has retained Indian country status but has delegated partial jurisdiction to states over areas of Indian country or over specific legal subjects." Cohen, *supra*, at 361. An example of such congressional action is Public Law 280, which grants certain states extensive criminal and civil jurisdiction over Indian country. *See* 18 U.S.C. § 1162 (criminal jurisdiction); 28 U.S.C. § 1360 (civil jurisdiction). Although this law "radically shifts the balance of jurisdictional power toward the states and away from the federal government . . . . [it does not] terminate the trust relationship between the tribes and the federal government." Canby, *supra*, at 176. Courts have determined that tribal jurisdiction—and thus Indian country—exists in states to which Public Law 280 applies. *See Bryan v. Itasca County*, 426 U.S. 373, 388-89, 96 S.Ct. 2102, 2110-11, 48 L.Ed.2d 710 (1976); *see also* David Case, *Alaska Natives and American Laws* 439 (1984) ("[E]ven P.L. 280 does not deprive a tribe of continuing (although concurrent) tribal jurisdiction"). This analysis indicates that the litmus test of federal superintendence is whether the federal government has abandoned its trust responsibilities, rather than whether the state government has been injected into tribal affairs.

Any law terminating the federal trust relationship with a Native tribe or organization must do so clearly and explicitly. Cohen, *supra*, at 224. ANCSA contains no such statement; in fact, it is clear that it did not extinguish federal superintendence of Alaska Natives. Therefore, the federal government continues to execute its trust responsibilities toward Alaska Natives.

First, the plain language and legislative history of the statute evince Congress's intent to maintain federal superintendence over Alaska Natives. While the Act promotes Native autonomy and disavows any "lengthy wardship or trusteeship," 43 U.S.C. § 1601(b), Congress declared that ANCSA did not "relieve, replace, or diminish any obligation of the United States or of the State or [sic] Alaska to protect and promote the rights or welfare of Natives. . . ." 43 U.S.C. § 1601(c). Additionally, Congress rejected an earlier version of the bill that would have transferred federal responsibilities for Alaska Natives to state authorities. *See* Alaska Native Claims Settlement Act of 1970, S. 1830, 91st Cong., 2d Sess. at § 4(b)(1) (1970).

Second, ANCSA neither prohibits nor discontinues the provision of federal services to Alaska Natives. Payments made under the Act do not "substitute for any governmental programs otherwise available to the Native people of Alaska. . . ." 43 U.S.C. § 1626(a). Indeed, Alaska Natives remain eligible for federal benefit programs after ANCSA:

> ANCSA did not end federal benefits and protections for Alaska Natives; it concerned only their lands and land-related claims. Natives in Alaska continue to be eligible for and receive assistance under federal programs available to Indians throughout the United States. All major Indian legislation since ANCSA specifically has included Alaska Natives or their villages or corporations.

Cohen, *supra*, at 766. Examples of such major legislation include the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(e), the Indian Health Care Improvement Act, 25 U.S.C. §§ 1603(c)–1603(d), the Tribally Controlled Community College Assistance Act, 25 U.S.C. § 1801(2), and the Indian Child Welfare Act, 25 U.S.C. §§ 1903(3), 1903(8).[4] Taken together, this patchwork of benefit programs demonstrates a continuing intent by Congress to maintain federal superintendence over Alaska Natives.

Third, the fact that ANCSA transferred title to settlement lands to corporate entities does not appear to have extinguished federal superintendence over Alaska Natives. The House Report accompanying ANCSA suggests that

[4] The State of Alaska has identified four acts of Congress that do not specifically define Alaska Native corporations as "Indians" or ANCSA land as "Indian land." In fact, only the Indian Gaming Regulation Act, 25 U.S.C. § 2701 et seq., defines "Indian lands" in a way that may not encompass ANCSA lands, *see* 25 U.S.C. § 2703(4)(B), and only the Indian Land Consolidation Act, 25 U.S.C. § 2201 et seq., defines "tribe" in a way that may not include Alaska Native corporations, *see* 25 U.S.C. § 2201(1). The Indian Law Enforcement Reform Act, 25 U.S.C. § 2801 et seq., adopts the definition of "Indian country" set forth in 18 U.S.C. § 1151—the very statute that we interpret today to contemplate Alaska Natives as dependent Indian communities. *See* 25 U.S.C. § 2801(4). The only other statute to which the State of Alaska cites can be read to *support* the notion that Congress continues to exercise superintendence over Alaska Natives. The National Indian Forest Resources Management Act, 25 U.S.C. § 3101 et seq., establishes an Alaska Native technical assistance program designed to promote the sustained yield management of Indian forest services. *See* 25 U.S.C. § 3112(a). The federal government provides this support directly to ANCSA corporations, implicitly recognizing the essentially Native character of such corporations.

Even if we were to read these four statutes as suggesting a disconnect between ANCSA corporations and Alaska Natives, we are not persuaded that they overcome the evidence of continuing federal superintendence over Alaska Natives that is contained in the major legislative initiatives affecting Indians.

the Act significantly diminishes federal supervision over Native corporations: "The regional corporations and the village corporations will be organized under State law, and will not be subject to Federal supervision except to the limited extent specifically provided in the bill." H.R. Rep. No. 523, 92d Cong., 1st Sess., *reprinted in* 1971 U.S.C.C.A.N. 2192, 2199. However, subsequent legislative action belies this intention and indicates that Congress continues to exercise federal superintendence over Native corporations. "Since the enactment of ANCSA, Congress has not excluded Alaska Natives from any programs available to other Native Americans and, indeed, specifically has included Alaska Natives, villages, *and corporations* among those eligible for programs under all new major Indian legislation." Cohen, *supra*, at 769 (emphasis added).

Furthermore, the Native corporations themselves are subject to federal controls that have not been imposed upon the general corporate community. Corporate articles and stock ownership are regulated by the federal government. *See, e.g.*, 43 U.S.C. § 1606(e) (requiring that Secretary of Interior must approve Native corporations' articles of incorporation and bylaws and that such articles and bylaws may not be amended for five years without Secretary's approval); 43 U.S.C. § 1606(h)(1)(B) (providing that stock in Native corporations is inalienable at corporations' election); 43 U.S.C § 1606(h)(2)(C) (providing that only Natives may own voting shares of stock); 43 U.S.C. § 1606(h)(2)(B) (granting Native regional corporations right of first refusal to shares transferred to a non-Native pursuant to intestate succession); 43 U.S.C. § 1606(h)(3)(D)(i) (corporation may amend its bylaws to give corporation the right to buy any stock offered for sale by a stockholder). Additionally, Native corporations may place their land in a "land bank," which entitles the corporation to various tax benefits. 43 U.S.C. § 1636.

Congress did provide Native corporations with the power to opt out of these supervisory controls, *see* 43 U.S.C. § 1629c(b) (alienability restrictions continue in perpetuity unless rescinded by Native corporation), and the decision to place land in a "land bank" is at the corporations' discretion. 43 U.S.C. § 1636. But these provisions do not indicate a clear congressional intent to *terminate* federal superintendence over Native corporations. Instead, when viewed in conjunction with the federal assistance provided to the members of these corporations, these provisions at most reflect the general ambiguity of ANCSA's effect on claims of Indian country in Alaska. This ambiguity has been recognized by Congress: "No provision of this Act (the Alaska Native Claims Settlement Act Amendments of 1987) . . . or change made by . . . this Act in the status of land shall be construed to validate or invalidate or in any way affect . . . any assertion that Indian country . . . exists or does not exist within the boundaries of the State of Alaska." Pub.L. No. 100-241 § 17(a)(2) (1988), 101 Stat. 1814. Because statutes affecting Indian rights "are to be liberally construed, doubtful expressions being resolved in favor of the Indians," *Alaska Pacific Fisheries,* 248 U.S. at 89, 39 S.Ct. at 42, we conclude that the transfer of title to Native corporations—and not to tribes—does not extinguish federal superintendence over the Alaska Natives who comprise those corporations.

Perhaps the strongest objection to this conclusion is that ANCSA appears to implement, in no uncertain terms, a policy of Native self-determination that is fundamentally at odds with the paternalistic echoes of the trust relationship. As noted above, ANCSA promotes Native autonomy and disavows any "lengthy wardship or trusteeship." 43 U.S.C. § 1601(b). How can this intent be reconciled with a continuing design to exercise federal superintendence over Alaska Natives?

The answer is found in the unique relationship that Native Americans share with the federal government. On July 8, 1970, President Nixon enunciated a federal policy toward Indians that continues to this day: self-determination without termination of the trust relationship. The President "called for rejection of the extremes of termination and paternalism: termination because it ignored the moral and legal obligations involved in the special relationship between tribes and the federal government, and paternalism because it resulted in 'the erosion of Indian initiative and morale.'" Cohen, *supra,* at 186 (quoting Richard M. Nixon, *Special Message to the Congress on Indian Affairs* (July 8, 1970)). The reconciliation of self-determination and superintendence is reflected in the Indian Self-Determination and Education Assistance Act of 1975, where Congress declared its commitment.

> to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

25 U.S.C. § 450a(b). The federal government is fulfilling, not abandoning, its trust responsibilities when it facilitates Indian self-determination. Moreover, as expressed by the Self-Determination Act, Indian self-determination involves increased participation of Native Americans in the administration of federal programs, not the elimination of those programs nor the removal of federal officials from a supervisory role over those programs.

We believe that ANCSA also implemented the federal policy of self-determination without termination of the

trust relationship. Accordingly, we find that Native self-determination and ongoing federal superintendence may coexist, and that this is precisely the federal-tribal relationship that was introduced by ANCSA.

In sum, we hold that ANCSA neither eliminated a federal set aside for Alaska Natives, as such, nor terminated federal superintendence over Alaska Natives. As a result, Indian country still may exist in Alaska.

DOES VENETIE OCCUPY INDIAN COUNTRY?

Having determined that ANCSA does not extinguish Indian country in Alaska, we must ask: Is Venetie a dependent Indian community? The district court found that prior to ANCSA, the Venetie Reservation had been set aside for the Neets'aii Gwich'in as Alaska Natives, and its inhabitants were subject to the active superintendence of the federal government. Its conclusion that Venetie no longer constitutes a dependent Indian community rests on the changes effected by ANCSA.

We have determined that ANCSA does not extinguish Indian country in Alaska as a general matter. This conclusion changes the import of the district court's factual findings; when we accord a broad interpretation to set aside and superintendence, the district court's factual findings actually support the determination that the land owned by Venetie is Indian country. We proceed to illustrate this point by examining the relevant factors of our six-pronged inquiry, mindful of the overarching prerequisites to a dependent Indian community—set aside and superintendence.[5]

[5] The factual predicate for the following discussion is drawn from the district court's tribal status and Indian country opinions in this case. The district court's factual findings are not clearly erroneous, and we accept them without objection. Our difference with the district court concerns the legal significance of these factual findings.

A. *The Nature of the Area*

Venetie owns the former Venetie Reservation, an area of 1.8 million acres that is the heart of the land traditionally used by the Neets'aii Gwich'in. This land is isolated and undeveloped; it is not accessible by surface roads or railroads. We accept the district court's conclusion that "the Neets'aii Gwich'in have, since before the appearance of non-natives, inhabited a reasonably well-defined territory to the virtual exclusion of other people; and in modern times have occupied much of that same territory, in the form of the Venetie Reservation. They still occupy this same land."[6] The district court also found that the land owned by Venetie is well suited to the Tribe's subsistence lifestyle. These determinations support the conclusion that Venetie has a special "use and occupancy" relationship to the land at issue.

B. *The Relationship of the Area Inhabitants to Indian Tribes and the Federal Government*

Venetie is home to the Neets'aii Gwich'in, and its inhabitants are, almost exclusively, members of that Tribe. The near-perfect correlation between area inhabitants and tribal membership indicates the strong ties between the land, its people, and the Tribe.

The area inhabitants are similarly bound to the federal government. Venetie has enjoyed a long history of interaction with federal officials. Since the early part of this century, the Bureau of Indian Affairs has been involved in the administration of educational and health services in Venetie. The BIA operated a school at Arctic Village until 1970 and at Venetie until 1984. Venetie obtained one of the first approved constitutions under the Indian

[6] This conclusion is contained in the district court's tribal status decision in the Venetie case, in which the court held that Venetie qualifies as an Indian tribe. This holding is not challenged on appeal.

Reorganization Act. The district court acknowledged that the inhabitants of Venetie maintain "significant contacts and relationships" with numerous federal agencies. And as the district court recognized, the fact that the Tribe has established ties to the State of Alaska "is not inconsistent with a finding of Indian Country if all of the elements of such are proven." *See John*, 437 U.S. at 652 n. 23, 98 S.Ct. at 2550 n. 23 ("[T]he provision of state services to Indians would not prove that the Federal Government ha[s] relinquished its ability to provide for these Indians under its Article I power.").

C. *The Established Practice of Government Agencies Toward the Area*

Despite the longstanding relationship between Venetie and the federal government and the continuing interaction between the Tribe and federal agencies, the district court found that the federal government's role in providing various services to the area had diminished in two principal respects. First, "federal largess is now available in the form of grants and other programs which are administered by Native people themselves with general oversight by agencies as opposed to direct agency services to the tribe." Second, the State of Alaska has played a more pervasive role in providing these services.

Undoubtedly, the practice of federal agencies toward Venetie has changed since ANCSA was enacted in 1971. In many respects, the federal government has been replaced by either the State or the Tribe itself as the direct provider of services. If the litmus test of federal superintendence was that such superintendence be "pervasive," meaning that it be the "dominant political institution" in the area as compared to the state, the diminished federal role would undermine the conclusion that federal superintendence over Venetie continues today. But "dominance" is not the proper benchmark of superintendence. As explained *supra*, the litmus test of federal superintendence is whether the federal government has abandoned its trust responsibilities, not whether the state government has been injected into tribal affairs.

On the record before us, it is clear that the federal government continues to be involved in the affairs of the Neets'aii Gwich'in. For example, as noted by the district court, "[f]ederal grants have been approved for an airport at Arctic Village, a 29-unit housing project at Venetie, water and wastewater systems at Arctic Village and Venetie, housing renovation at Venetie, and a self-governance project. There were other similar federal grants as well." This supports a finding that Venetie has met the federal superintendence requirement of the dependent Indian community test.

D. *The Degree of Federal Ownership of and Control over the Area*

ANCSA terminated federal ownership of the Venetie Reservation. Today, Venetie owns its land in fee simple, and the federal government exercises few controls (if any) over Venetie's territory. As noted above, however, tribal ownership of land in fee does not defeat a finding of Indian country. *Cf. Sandoval*, 231 U.S. at 48, 34 S.Ct. at 6; *Narragansett*, 89 F.3d at 918. It does mean that the Tribe must produce alternative evidence of federal superintendence over Native affairs in the territory. Based on our findings in subsections B and C, *supra*, we conclude that the Tribe has met this burden.

E. *The Degree of Cohesiveness of the Area Inhabitants*

The high degree of cohesiveness among the inhabitants of Venetie is uncontested. We have no reason to depart from the district court's finding that

> the Neets'aii Gwich'in are a cohesive community. All but a few residents of the area (notably school teachers) are Alaska Natives and members of the

tribe. They have at all times relevant to this case, right down to the present, voluntarily come together for purposes of forming their own traditional councils which have provided for the protection and welfare of the whole community.

F. *The Extent to Which the Area Was Set Aside for the Use, Occupancy, and Protection of Dependent Indian Peoples*

The district court correctly acknowledged that when the Neets'aii Gwich'in obtained a reservation in 1943, "this land was set aside for [them] as a Native people." The district court concluded, however, that the land at issue is no longer set aside for the use and occupancy of Alaska Natives, as such. This conclusion was based upon ANCSA's extinguishment of the Venetie Reservation and the Act's transfer of land not to the Neets'aii Gwich'in Tribe but to a corporate entity. As indicated in our general discussion of ANCSA's impact upon the federal set aside requirement, *supra,* we disagree with this conclusion. We believe that the village corporations established under ANCSA, while business entities, maintain a distinctly Native identity. Accordingly, we conclude that land set aside for such corporations qualifies as land set aside for the use, occupancy, and protection of Alaska Natives, as such.

Venetie presents an especially compelling illustration of this conclusion. Section 1618(b) of ANCSA permits a village corporation to acquire title to "any reserve set aside for the use or benefit of its stockholders or members prior to December 18, 1971." In exchange, the village corporation forfeits any claim to land or funds distributed by the regional corporation under ANCSA. When the members of the Venetie and Arctic Village corporations voted to exercise their rights under § 1618(b), they received a parcel of land that mapped the former reservation of their common Tribe—the Neets'aii Gwich'in.

Title to this former reserve was subsequently transferred to Venetie, effecting the result made possible by § 1618(b): reunification of the Tribe and its reserve land.

We believe that this result strengthens the conclusion that a federal set aside for the use and occupancy of the Neets'aii Gwich'in, as such, has been maintained. Section 1618(b) may use the general corporate form of ANCSA, but its underlying purpose is to permit Alaska Natives to retain the historic connection between tribes and their lands. Corporations may be the vehicle through which this goal is accomplished under § 1618(b), but this section defines eligible land according to the pre-ANCSA claims of corporation *members.* The reunification of Venetie with its former reservation land demonstrates that the land has been set aside for Indians, *as such*—an assertion that is somewhat less straightforward where Native corporation land does not share such a close association with former tribal land.

The foregoing application of our six-factor inquiry indicates that Venetie meets the set-aside and superintendence requirements of the dependent Indian community test. Although the federal government no longer owns or controls the former Venetie Reservation, every other factor of our inquiry supports the conclusion that Venetie occupies Indian country: Venetie has a special "use and occupancy" relationship to its land; the inhabitants of Venetie maintain "significant contacts and relationships" with numerous federal agencies; the federal government continues to be involved in the affairs of the Neets'aii Gwich'in; the high degree of cohesiveness among its inhabitants indicates that Venetie is a strong and distinct Native community; and the reunification of Venetie with its former reservation land via a statutory mechanism provided by Congress demonstrates that the land has been set aside for Indians, *as such.* We therefore conclude that Venetie is a dependent Indian community and that, accordingly, its territory qualifies as Indian country.

CONCLUSION

This nation has a special relationship with and responsibility toward Native American citizens. The Alaska Native Claims Settlement Act is a unique and innovative attempt to meet that responsibility. It marks a genuine endeavor to facilitate Native self-determination by providing for the direct involvement of Alaska Natives in the management of their affairs. This policy of self-determination fulfills the special relationship between Alaska Natives and the federal government; it does not terminate that relationship. Absent a clear and unequivocal expression by Congress, we will not imply that such termination has occurred.

ANCSA does not contain a definitive statement expressing its effect upon Indian country in Alaska. In fact, various elements of ANCSA indicate that a federal set aside was conveyed by the Act and that federal superintendence of Alaska Natives was preserved under the Act. Accordingly, we hold that ANCSA did not extinguish Indian country in Alaska, and that Venetie, having demonstrated that it qualifies as a dependent Indian community, occupies its territory as Indian country.

The judgment of the district court is REVERSED and this case is REMANDED to the district court to determine whether Venetie has the power to impose a tax upon a private party where the State of Alaska will ultimately pay the obligation.[7]

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[7] In *Venetie I*, Venetie argued that sovereign immunity shielded it from suit and that, in the alternative, the tribal abstention doctrine precluded the federal court from hearing Alaska's claim until it was adjudicated in tribal court. The *Venetie I* court declined to reach either argument on the ground that both contentions depended upon a preliminary finding that Venetie was a tribe.

On remand, the district court held that Venetie is in fact a tribe. However, Venetie asserts neither sovereign immunity nor the tribal abstention doctrine on this appeal.

FERNANDEZ, Circuit Judge, concurring:

Because judges are historically minded and experts at analogical reasoning, it is very tempting to treat ANCSA as just another statute to be adjudged as if it were a mere continuation of prior Indian policy. A continuation, that is, if that policy can really be called continuous. But ANCSA was intended to be and was something very different. It attempted to preserve Indian tribes, but simultaneously attempted to sever them from the land; it attempted to leave them as sovereign entities for some purposes, but as sovereigns without territorial reach. Thus, the land and the vast sums of money made available did not go to the tribes. It went into mere private corporations.

Those corporations were to be separate from the tribes, could sell land, and could even be taxable eventually, although the land could also be placed in tax-free preserves, just as anyone else's land can be under proper circumstances. The tribes were no longer land based; they were member based. In short, Congress wanted to provide for "maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges . . ." in Alaska. 43 U.S.C. § 1601(b). The tribes would continue as sovereigns, but there would be no more Indian country because the land would not be set aside by the United States "for the use of the Indians as such." *United States v. Pelican*, 232 U.S. 442, 449, 34 S.Ct. 396, 399, 58 L.Ed. 676 (1914). Nor would it remain "under the superintendence of the government." *Id.; see also Op. Sol. Gen. of Dep't of Interior*, M-36975, 131-33 (Jan. 11, 1993).

Let me put it a slightly different way. The reason that the old Indian country test will not work is that Con-

gress's new conception was to maintain tribal sovereignty and to maintain a federal interest in and protection of Indians and tribes, but to separate the land, and an almost billion-dollar fund, from the tribes themselves. That left a potent resource in the hands of the Indian peoples. It also left tribal sovereignty intact, but it simultaneously precluded that sovereignty from being reified in the form of control over land.

In so doing, Congress disassociated the land from all other claims, including Indian country claims. It did so explicitly when it extinguished all claims "based on claims of aboriginal right, title, use, or occupancy of land . . . or . . . based on any statute or treaty. . . ." 43 U.S.C. § 1603(c). The very idea of Indian country is, of course, a notion incorporated into a statute. *See* 43 U.S.C. § 1151. Moreover, the assertion of § 1151 sovereignty over territory is a claim which is necessarily based upon aboriginal title, statute, or treaty. Both were abolished. As we have previously recognized, the provenance of ANCSA was unique, so even the old rule of construction of statutes in favor of Indians "operates with less force." *United States v. Atlantic Richfield Co.*, 612 F.2d 1132, 1139 (9th Cir.1980). That uniqueness is why the old tests just do not work.

Of course, the land deeded to the private corporations was for the benefit of their Indian stockholders, just as the money was for their benefit. Of course, those same Indian stockholders tended to be members of tribes, though they did not need to be. Of course, the government retained its interest in the tribes, as such, and in the Indian peoples themselves. Perhaps not every group could show cohesiveness, but it certainly is true that the land was set aside for Indian peoples *ab initio*, although in no sense was most of it for their exclusive use, occupancy, or protection any more than land owned by any other corporate entity is for the use, occupancy, or protection of its members. But

all of that is really rather irrelevant under the new regime. If ANCSA meant anything at all, it meant that the tribes, as such, would no longer have control or sovereign power over the land. They would only have sovereignty over their members. As far as the land was concerned, the regular state and federal political entities would have and retain the necessary power. In short, it was no longer necessary to explicate and mull over previous Indian country concepts. That was the promise of the new era. When Congress did all of that, it created something rather different, rather unique, rather simple, and yet rather daedalian.

We have been asked to confuse matters by applying out-of-date theories to a truly new concept of Indian relationships and sovereignty. We have been asked to blow up a blizzard of litigation throughout the State of Alaska as each and every tribe seeks to test the limits of its power over what it deems to be its Indian country. There are hundreds of tribes, and the litigation permutations are as vast as the capacity of fine human minds can make them. They can include claims to freedom from state taxation and regulation, claims to regulate and tax for tribal purposes, assertions of sovereignty over vast areas of Alaska, and even assertions that tribes can regulate and tax the various corporations created to hold ANCSA land. The latter assertion would give the tribes the power to control, regulate, and tax those corporations out of existence and would provide a fruitful area for intertribal conflict. This is no imaginative parade of horribles. In the cases before us today, one tribe, Kluti Kaah, seeks sovereignty over an area as unlike Indian country as one could imagine. The other seeks sovereignty, and has been made sovereign, over a piece of the State of Alaska about as large as the State of Delaware. Furthermore, both Kluti Kaah and Venetie assured us at argument that tribes, as they see it, do have the power to tax and regulate the myriad of private corporations which received land under ANCSA.

Were we writing on a clean slate, I would eschew the tribe's request and would avoid creating the kind of chaos that the 92nd Congress wisely sought to avoid. Alas, it is too late because we have already taken the position that ANCSA did not eliminate Indian country in Alaska. We have directed that decisions be made on a case-by-case basis. *See State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1390-91 (9th Cir.1988) (*Venetie I*); *cf. Native Village of Tyonek v. Puckett*, 957 F.2d 631, 634 (9th Cir.1992). It is unfortunate that what could have been a tessellation is to be a crazy quilt instead. But if we are to have that quilt, I agree that Venetie's territory is Indian country, if any still exists in Alaska.[1] Needless to say, I do not embrace that result with the gusto shown by the majority, and I do not accept all of the majority's reasoning.

Nevertheless, under the compulsion of our cases, I concur in the result.

[1] Of course, I recognize that there is an exception. One reservation was preserved. *See* 43 U.S.C. § 1618(a).

APPENDIX B

[Filed Aug. 2, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. F87-0051 CV (HRH)

STATE OF ALASKA, *ex rel.*, YUKON FLATS SCHOOL DISTRICT UNALAKLEET/NEESER CONSTRUCTION JV, UNALAKLEET NATIVE CORPORATION, NEESER CONSTRUCTION COMPANY, and GERALD NEESER,

Plaintiffs,

vs.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, a/k/a THE NATIVE VILLAGE OF VENETIE, THE VENETIE TAX COURT, THE VENETIE TAX COMMISSION, GIDEON JAMES, LAWRENCE ROBERTS, LARRY WILLIAMS, ERNEST ERICK, LINCOLN TRITT, JOHN TITUS, and DAVID CASE,

Defendants.

ORDER
(Decision—Indian Country)

This opinion constitutes the court's decision with respect to the contention of the defendants (herein collectively the Tribal Government) that the lands surrounding Venetie and Arctic Village, Alaska are Indian Country.[1]

[1] This case and the related case of *Native Village of Venetie I.R.A. Council, et al. v. State of Alaska, et al.*, Case No. F86-0075 CV ("Adoption Case"), were heretofore consolidated for purposes of trial. The cases were still consolidated when post-trial briefing on the issue which is the subject of this decision was filed. As a consequence, the briefing has been filed on behalf of the defendants in the name of Native Village of Venetie I.R.A. Council; however,

Introduction

This court has held that the Neets'aii Gwich'in of Venetie and Arctic Village, Alaska are a tribe of Indians. Order of December 23, 1994, at 23, *et seq.*.[2] The court turns now to the question of whether the lands of the Neets'aii Gwich'in which are held in fee simple by the tribes' political institution, the Native Village of Venetie Tribal Government, are Indian Country.

The history of this case is set out in detail in the court's tribal status decision. For purposes of this opinion, that case history is summarized as follows: In this case (herein sometimes the "Tax Case"), the plaintiff State of Alaska sought and was granted a preliminary injunction preventing assessment and collection of a gross receipts tax which Venetie sought to impose upon the contractor constructing a school for the State of Alaska. The Ninth Circuit Court of Appeals sustained that injunction. *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir. 1988). In this court, the Tax Case was consolidated for trial with an adoption case, *Native Village of Venetie I.R.A. Council v. State of Alaska*, F86-0075 CV, for a trial of the "tribal status issues".[3] Trial of the tribal status issues, including Indian Country, was

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the court understands this briefing to be filed on behalf of all defendants in now-severed *State of Alaska, et al. v. Native Village of Venetie Tribal Government, et al.*, Case No. F87-0051 CV.

[2] Clerk's Docket No. 142 in Case No. F86-0075 CV, the Adoption Case. This order is hereinafter sometimes referred to as the "tribal status decision".

[3] Case No. F86-0075 CV, Clerk's Docket No. 65. It is clear from subsequent development of the case that all of the parties understood that the "tribal status issues" had reference to both tribal status per se *and* the Indian Country issue. *See* Joint Statement of Issues filed October 1, 1993, Clerk's Docket No. 95 in Case No. F86-0075 CV. The adoption case and the Tax Case have since been severed inasmuch as the adoption case does not involve a claim of Indian Country.

comenced on November 1, 1993, and concluded on November 5, 1993. By agreement of the parties, written briefs were filed in lieu of closing arguments. As to one aspect of the Indian Country issue, the court requested and received supplemental briefing from the parties. The question now before the court is whether the lands of the Neets'aii Gwich'in are Indian Country such that the Tribal Government has the power to impose taxes on nonmembers including the contractor who undertook to construct a school in Arctic Village for the State of Alaska.

The term "Indian Country" has a long, convoluted and interesting history. The term "Indian Country" is defined in 18 U.S.C. § 1151(b) as including "all dependent Indian communities within the borders of the United States. . . ."

The term dependent Indian community is not defined by statutory law and is ill-defined by case law. Based upon early case law, recent case law has suggested a set of factors which are relevant to a finding that certain lands are or are not Indian Country. These factors, such as the *nature* of the area claimed to be Indian Country or the *degree* of federal ownership and control of the area, are relative, not absolute. The case law is not always clear as to whether the focus of dependency is upon economics or politics. Based upon the review of relevant case law which follows, the court concludes that "dependent Indian communities" are Alaska Native tribes subject to the requisite degree of political superintendence[4] by the federal government and occupying lands set

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[4] The statutory use of the term "dependent" to modify Indian Country tends to suggest that the focus is upon the state of the tribe claiming to occupy Indian Country. This focus too easily leads to a discussion of only economics. Current Supreme Court case law as hereinafter discussed largely avoids the term "dependent" in favor of the terms "superintendence" or "federal supervision" which tend to broaden and shift the focus of atten-

aside for Alaska Natives as such. The court concludes that the requisite degree of superintendence exists where the degree of congressional and Executive agencies' control over the Alaska Native tribe is so pervasive as to evidence an intention that the federal government, not the state, be the dominant political institution in the area.

Development of Indian Country Case Law

During the early 1700s, Indian affairs were handled on a piecemeal basis by the individual colonies. In 1755, the British government, dissatisfied with the colonies' inconsistent treatment of the Indians, took the first step to centralize relations with the tribes. Two British superintendents were assigned the responsibilities of protecting the Indians from unscrupulous traders, negotiating boundary lines between the colonies and tribal lands, and enlisting the Indians to fight with the British in wartime. This approach met with only mixed success, and as a practical matter most trade relations remained in the hands of the colonists. Francis P. Prucha, *American Indian Policy in the Formative Years* 11 (1962) (hereinafter "Prucha, at —").

To strengthen British control over Indian affairs, King George III of England issued the Proclamation of 1763. The Proclamation established for the first time a boundary line between the lands of the Indians and those of the whites. This was the first official definition of Indian Country. The members of the British ministry agreed to temporarily draw the line along the crest of the Appalachian range. Everything to the west of the mountains and east of the Mississippi was Indian Country. Lands west of the Mississippi were claimed at that time by France or Spain.

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tion to the entirety of the relationship of the federal government to the tribe. *United States v. John*, 437 U.S. 634, 649 (1978).

Over the next few years, the British began the process of establishing a detailed boundary line by a series of treaties with individual tribes. By 1769, the line started in upper New York, near the eastern end of Lake Ontario, ran in a southerly direction to the Delaware River, then west to the Allegheny River, down that river to the Ohio, and west along the Ohio to the mouth of the Tennessee. It then ran through what is now Kentucky, along the back of the Carolinas, and through the future state of Georgia to the sea. Although the idea of a line was firmly entrenched, it constantly moved westward as the Indians were compelled to cede more lands through new treaties and purchases.

With the coming of the Revolution and the alliance of the Indians with the British, the Continental Congress was faced with the task of formulating its own policy regarding the Indians. The British approach to unified management had gained in success, and despite opposition by colonies that wished the authority to regulate trade with Indians, the new Congress[6] agreed that Indian affairs belonged to the central government. Congress asserted the sole and exclusive right to deal with the tribes. The first treaties after the Revolution continued to whittle away at Indian holdings, while white settlers relentlessly encroached on tribal lands without regard to treaty boundaries. *Id.* at 26-34.

By 1795, the constant intrusions of the whites upon Indian lands caused hostilities to escalate, and President Washington asked Congress to act. In response, Congress passed the Indian Intercourse Act of 1796. 1 Stat. 469.

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[6] The work of the constitutional convention having been completed, and the states having ratified the Constitution of the United States, effective May 4, 1789, the federal Congress became empowered "[t]o regulate Commerce with foreign Nations, and among the several States and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3.

This law contained the first statutory definition of Indian Country. It traced a convoluted line of treaty boundaries beginning at the present-day site of Cleveland, Ohio on the shores of Lake Erie south to the Ohio River, down that river to the mouth of the Tennessee, then along the back of the Carolinas and through Georgia to the sea. The Indian Intercourse Act of 1796 was recodified, with minor revisions that corresponded to treaty modifications, in 1799, 1 Stat. 743, and again in 1802, 2 Stat. 139.

The statutory definition of Indian Country remained unchanged until Congress undertook a wholesale revamping of Indian policy in 1834. The Intercourse Act of 1802 had long been subject to criticism as ineffective in meeting recurring problems in trade and land disputes. The regulation of traders needed to be tightened, the restrictions on liquor in the Indian Country needed better enforcement, and encroachment on Indian land had not been prevented. Congress determined to address all concerns in a single piece of legislation. The new legislation kept the idea of a boundary line between Indian lands and those of whites, but it was no longer practical, given the multiplication of treaties and changing circumstances of the Indians, to draw the line in detail as it had been in 1796, 1799 and 1802. *Prucha*, at 250-61.

The Indian Intercourse Act of 1834 began with this definition of Indian Country:

> Be it enacted . . ., That all that part of the United States west of the Mississippi [6], and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state[,] [7] to which the Indian title has not been

[6] In 1834, the land west of the Rockies was still claimed by Mexico or England.

[7] The bracketed comma was implied by the Supreme Court in *Bates v. Clark*, 95 U.S. 204 (1877), which is discussed below.

> extinguished, [shall] be taken and deemed to be the Indian country.

4 Stat. 729 (1834). This definition remained on the statute books until the compilers of the Revised Statutes omitted it, effecting its repeal in 1874. R.S. § 5596 (effective June 22, 1874). The Revised Statutes retained most of the substantive sections of the 1834 Act applicable in Indian Country, but without a statutory definition, the determination of what comprised Indian Country was left to the courts. Felix S. Cohen, *Handbook of Federal Indian Law* 31 (Rennard Strickland & Charles F. Wilkinson eds., 1982).

In 1877, the Supreme Court in *Bates v. Clark*, 95 U.S. 204 (1877), reviewed a case that arose before the repeal of the 1834 definition of Indian Country. *Bates* involved the legality of the seizure of liquor by a military officer on land in the Dakota Territory that had been ceded to the United States by the Indians. Under the wording of the 1834 definition, it was arguable that all of the Dakota Territory remained Indian Country despite Indian cessions. The court rejected that interpretation and implied a comma between the phrase "and not within any state" and the phrase "to which the Indian title has not been extinguished." Under this reading, the latter phrase applied to lands on either side of the Mississippi. Thus, aboriginal Indian lands were Indian Country as long as the Indians had title to it, but as soon as they parted with their aboriginal title it ceased to be Indian Country, without further act by Congress. *Bates*, 95 U.S. at 208-9. This definition was soon augmented to include reservation lands to which Indian title had not been extinguished, whether situated within a territory, *Ex Parte Crow Dog*, 109 U.S. 556 (1883) or a state *United States v. Le Bris*, 121 U.S. 278 (1887).

The next important extension of the *Bates* definition occurred in 1913 in the case of *Donnelly v. United States*,

228 U.S. 243 (1913), which presented the question of whether federal jurisdiction extended to a murder committed on an executive order Indian reservation. The reservation was located in a part of California to which aboriginal title had long been extinguished. The court affirmed the conviction, holding that:

> [Indian Country] cannot not be confined to land formerly held by the Indians, and to which their title remains unextinguished. And, in our judgment, nothing can more appropriately be deemed "Indian Country," . . . than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation.

Donnelly, 228 U.S. at 269. *Donnelly* was the first case in which the result turned on whether the land had been "set apart" by the government for Indians.

Also in 1913, the Supreme Court decided *United States v. Sandoval*, 231 U.S. 28 (1913). The *Sandoval* decision is particularly important because it focused upon the concept of a "dependent Indian community."

The subject of *Sandoval* was a criminal prosecution under federal law for introducing liquor into the Santa Clara Pueblo in New Mexico. The New Mexico Enabling Act, 36 Stat. 557 (June 20, 1910), provided that as a condition of statehood New Mexico must prohibit the introduction of liquor into Indian Country, including the lands owned by the Pueblo Indians. The United States District Court had dismissed Sandoval's indictment on the grounds that the application of federal law to the Pueblo Indians was a usurpation of *state* police power beyond the limits of the *congressional power* to regulate Indian affairs. *United States v. Sandoval*, 198 Fed. 539 (D.N.M. 1912). The Supreme Court reversed.

The Pueblo lands were held by the tribe in communal fee simple under grants from the King of Spain in the 17th century. When New Mexico became a portion of

the United States under the treaty of Guadalupe Hidalgo in 1848, the treaty provided that the property rights of the New Mexican citizens would be "inviolably respected." Treaty with the Republic of Mexico, Feb. 2, 1848, 9 Stat. 922, 929. Soon thereafter, Congress made it the duty of the Surveyor General of New Mexico to submit a report to Congress regarding the extent of the Pueblo land titles. 10 Stat. 308 (July 22, 1854). Congress then confirmed the bona fide claims of the Pueblo Indians and relinquished all claims by the United States to their lands. By this act of confirmation Congress did not "set aside" federal lands for the use and occupancy of Indians. However, Congress expressly provided in New Mexico Enabling Act that Pueblo lands were "Indian Country" for purposes of federal liquor laws.[8]

Contrary to a common perception of *Sandoval*, it was not a case where the United States Supreme Court itself extended the prior case law of Indian Country so as to include fee land acquired by Indians from third parties as distinguished from a government set-aside of land. Congress itself had declared the Pueblo lands to be Indian Country. What the Supreme Court had to decide in *Sandoval* was the question of whether the prohibition of introducing liquor into New Mexico as contained in the New Mexico Enabling Act unconstitutionally infringed upon a state's retained power (the equal footing doctrine). It was in this context that the Supreme Court discussed, at very great length, the circumstances of the Pueblo Indians. The Court referred to the Pueblo people as "simple, uninformed and inferior." *Sandoval*, 231 U.S. at 39. It characterized them as being in need of "special

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[8] Section 2 of the New Mexico Enabling Act, 36 Stat. 557 (June 20, 1910), provided in pertinent part that:

> [T]he sale, barter or giving of intoxicating liquors to Indians and the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are foreover prohibited.

consideration and protection." *Id.* The Court noted that "public moneys have been expended in presenting them with farming implements [etc.]". *Id.* The Supreme Court included a long recitation of information from reports of government agents with respect to the Pueblo Indians, which reports were characterized as showing "that they [the Pueblo people] are dependent upon the fostering care and protection of the Government, like reservation Indians in general; that, although industrially superior, they are intellectually and morally inferior to many of them; and that they are easy victims to the evils and debasing influence of intoxicants." *Id.* at 40-41.[9]

With the facts thusly discussed, the Supreme Court turned to precedents bearing upon the legal question before it observing:

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising

[9] The Supreme Court's factual finding that the Pueblo Indians were a "simple, uninformed and inferior people", and so forth, was contrary to the opinion of the District Court Judge who noted that

> [i]ntegrity and virtue among them is fostered and encouraged . . . [T]hey are a peaceable, industrious, intelligent, honest, and virtuous people. They are . . . superior to all but a few of the civilized Indian tribes of the country, and the equal of the most civilized thereof.

198 Fed. at 544 *quoting United States v. Lucero*, 1 N.M. 422 (N.M. 1869).

The Supreme Court's measure of dependency, which could be charitably described as paternalistic or more realistically as racist, is no longer relevant in today's legal framework. Nevertheless, properly understood and restricted to its holding on the law, *Sandoval* remains useful because it is a part of the legal foundation for the enactment of 18 U.S.C. § 1151(b).

> a fostering care and protection over all dependent Indian communities within its borders. . . .

Id. at 45-46. The Court summarized prior case law as holding that:

> [I]t may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not for the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.

Id. at 46 (quoting *Tiger v. Western Investment Co.*, 221 U.S. 286, 315 (1911)). On the basis of the foregoing, the Supreme Court held that:

> [T]he legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and, considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them cannot be said to be arbitrary but must be regarded as both authorized and controlling.

Id. at 47. Addressing an argument that the Pueblos' fee simple title was an impediment to the proscription of liquor by the New Mexico Enabling Act, the Supreme Court observed that while the Indians did have fee title to the land in question, it was nonetheless observed that this was a "communal title, no individual owning any separate tract." *Id.* at 48. The court characterized the land as "public lands of the pueblo" and as such "subject to the legislation of Congress enacted in the exercise of the Government's guardianship over those tribes and their affairs." *Id.* The Court held that Congress had the con-

stitutional power to "apply the [liquor] prohibition to the lands of the Pueblos." *Id.*

The next year following *Sandoval*, the Court in *United States v. Pelican*, 232 U.S. 442 (1914), held that a trust allotment is Indian Country for purposes of the Indian Country Crimes Act. The Court, citing *Donnelly*, stated that the test for determining whether an allotment was Indian Country was whether the land in question "had been validly set apart for the use of the Indians as such, under the superintendence of the Government." *Pelican*, 232 U.S. at 449. As in *Donnelly*, the "set apart" language was used in *Pelican* to refer to a type of federal trust land.

The last major development in the case-law definition of Indian Country came in *United States v. McGowan*, 302 U.S. 535 (1938). The issue in *McGowan* was whether land in Nevada purchased after statehood by the federal government and held in trust for Indians was Indian Country. The Court, citing *Sandoval*, characterized the area as a dependent Indian community. It concluded that the trust lands in question were the functional equivalent of a reservation, and, relying on *Pelican*, it held that Indian Country includes lands wherever situated, which have been validly set apart for the use of Indians under the superintendence of the government. *McGowan*, 302 U.S. at 539.

In 1948, in order to overcome confusion which had arisen on the subject, Congress enacted a statutory definition of Indian Country:

> [T]he term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory

> thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151.[10] Section 1151 is in substance a codification of *Donnelly*, *Sandoval*, *Pelican*, and *McGowan*. Revisor's note, 1948 Act, Title 18 U.S.C.A. at 86 (West 1986). Subsection (a) regarding reservation lands is a codification of *Donnelly*, (c) represents the holding of *Pelican* regarding allotment lands, and (b) is a codification of the "dependent Indian community" concept as developed in *Sandoval* and *McGowan*.

Appropos of its common law heritage, the concept of Indian Country has continued to develop in courts of appeals and in the United States Supreme Court since the 1948 codification of the term. What emerges first, and from the courts of appeals, is a fact oriented methodology for evaluation of claims of Indian Country. Secondly, and coming from the United States Supreme Court decisions, we see a dramatic focusing upon the question of whether land has been validly set apart for the use of Indians as such, under superintendence of the government.

Two circuit court decisions, *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971), and *United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981), appear to lead the way in shaping the law of Indian Country subsequent to the enactment of 18 U.S.C. § 1151. It is these two cases which the Ninth Circuit Court of Appeals drew upon for its analysis of the merits of the Indian Country issue before it on interlocutory appeal from this court's earlier decision granting a preliminary injunction in favor

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[10] Although codified in Title 18 of the United States Code which covers crimes, there is no question but what the statutory definition of Indian Country has application in civil law as well as criminal law. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987).

of plaintiffs in this case. Each of *Martine* and *South Dakota* set out a multi-factored scheme of analysis for a determination of the "quite factually dependent" Indian Country issue. *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1391 (9th Cir. 1988).

In *Martine*, the Tenth Circuit concluded that the Navajo community of Ramah, New Mexico, was a dependent Indian community within the meaning of section 1151(b). The land in question was owned in fee by the Navajo tribe, having been purchased with tribal funds from a private corporate owner. The land was not within the boundaries of any Indian reservation. The land had never been set aside in any way by the federal government for the tribe.

In making its decision in *Martine*, the court relied upon *Sandoval*, drawing from the Supreme Court's discussion of the dependent Indian community status of the Pueblo Indians. The Tenth Circuit concluded that the trial court in *Martine* had properly considered the following factors:

> [1] [T]he nature of the area in question,
>
> [2] [T]he relationship of the inhabitants of the area to Indian Tribes and to the federal government, and
>
> [3] [T]he established practice of government agencies toward the area.

Martine, 442 F.2d at 1023.

In *South Dakota*, the Eighth Circuit dealt with a housing project located in Sisseton, South Dakota, concluding that it was a dependent Indian community. The land in question was within the boundaries of a terminated reservation. The land had been returned to public domain, sold by the United States, then reconveyed to the United States in trust for purposes of the housing project.

Relying in part upon *Martine*, the Eighth Circuit in *South Dakota* announced its formulation of the factors to be considered in determining whether a particular geographic area is a dependent Indian community:

> (1) whether the United States has retained title to the lands which it permits the Indians to occupy and authority to enact regulations and protective laws respecting this territory, . . .
>
> (2) the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area, . . .
>
> (3) whether there is an element of cohesiveness . . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality, . . . and
>
> (4) whether such lands have been set apart for the use and occupancy and protection of dependent Indian peoples. . . .

South Dakota, 665 F.2d at 839 (internal quotations and citations omitted).[11] Applying these factors to the evidence in *South Dakota*, the court determined that the land in question was a dependent Indian community and Indian Country. In analyzing the factors, the court held that the presence of a small number of non-Indian residents did not defeat a finding of a dependent Indian com-

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[11] This formulation comes from the earlier Eighth Circuit case of *Weddell v. Meierhenry*, 636 F.2d 211, 212-14 (8th Cir. 1980), *cert. denied*, 451 U.S. 941 (1981), which in turn quotes in the order appearing above, *United States v. McGowan*, 302 U.S. 535, 539 (1938), *United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir. 1971), *United States v. Morgan*, 614 F.2d 166, 170 (8th Cir. 1980), and *United States v. Mound*, 477 F. Supp. 156, 158 (D.S.D. 1979), which in turn cites other earlier cases.

munity. *Id.* at 842. The court observed that cohesiveness or common interests are more important to the existence of a community than mere numbers of people. The factors set out in *South Dakota* are to be evaluated on the basis of what is now, not on the basis of whether land might ultimately lose its status as Indian Country. *Id.* An assertion of state jurisdiction over the land does not defeat a finding of a dependent Indian community. *Id.*

Prior to the Eighth Circuit decision in *South Dakota,* the United States Supreme Court decided *United States v. John,* 437 U.S. 634 (1978). The case seems not to have attracted as much attention in Indian law cases as one might have expected. *John* is briefly mentioned in *South Dakota* for the proposition that a state assertion of jurisdiction over land does not necessarily defeat a finding of a dependent Indian community.

In *John,* the Supreme Court dealt with Choctaw Indian lands which the government had purchased for the Mississippi Choctaws and which Congress had declared to be trust lands. Subsequently, the Department of the Interior proclaimed these same lands to be a reservation.

The defendant, John, was indicted by a federal grand jury. He was tried and convicted of simple assault. On appeal, the Fifth Circuit held that the lands in question were not Indian Country and for this reason, John could not be prosecuted under federal law. *See* 18 U.S.C. § 1153. While the federal appeal was underway, John was indicted by a state grand jury in connection with the same incident giving rise to the federal prosecution. John was convicted of a more serious offense after a state court trial. He appealed, and the Mississippi Supreme Court affirmed, holding that the federal court did not have jurisdiction.

The United States Supreme Court rejected the conclusion of the Fifth Circuit and the Mississippi Supreme

Court on the Indian Country issue. After expressly taking notice of the three categories of land which Congress defined as Indian Country, it held, drawing upon the authority of *McGowan* and *Pelican*, that the test for the existence of Indian Country is, "whether the land in question 'had been validly set apart for the use of Indians as such, under the superintendence of the Government.'" *John,* 437 U.S. at 649 (quoting *United States v. Pelican,* 232 U.S. 442, 449 (1914), and *United States v. McGowan,* 302 U.S. 535, 539 (1938)). The Court held that the lands purchased for the Choctaws by the government, declared by Congress to be trust lands and by the Executive to be a reservation, constituted a set-aside of land for the use of Indians as such. The Court observed that "[t]he Mississippi lands in question here were declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians who were at that time under federal supervision." *John,* 437 U.S. at 649. This court takes the foregoing statement to reinforce a point that is easily overlooked: it is not *land* but *Indians* which must be under the superintendence of the government in the *Pelican/John* test for Indian Country.

The Court rejected Mississippi's contention that the Choctaw's had been assimilated and were no longer subject to federal government supervision. As regards superintendence, *John* contains several significant holdings. Firstly, the fact that the Mississippi Choctaws were a "remnant" of a larger tribe which had been forced out of Mississippi did not defeat "federal power to deal with [the remnant]." *John,* 437 U.S. at 653. Secondly, the fact that federal supervision of the Mississippi Choctaws was not continuous did not defeat "federal power to deal with them." *Id.* Thirdly, citizenship status did not defeat the power of Congress to legislate for the Mississippi Choctaws. *Id.*

In 1991, in a case somewhat more analogous to that before this court, the United States Supreme Court again returned to the Indian Country question in *Oklahoma Tax Comm'n v. Citizen Band Potowatomi Indian Tribe of Oklahoma,* 498 U.S. 505 (1991). In *Potowatomi,* the Indian tribe sold cigarettes without collecting state sales taxes from a store located upon land held in trust for the tribe by the federal government. Oklahoma sought to collect the taxes. The tribe sued to enjoin the collection of taxes and Oklahoma counterclaimed seeking both to collect the taxes past due and to enjoin the tribe from further sales without collecting applicable state taxes. The bulk of the discussion in *Potowatomi* has to do with issues of jurisdiction and sovereignty. The case is of value here, however, because unlike *John* which dealt with reservation lands, the land in *Potowatomi* was not in a reservation although it was, as indicated above, held by the federal government in trust for the tribe.

The Court held in *Potowatomi* that the characterization of land as a tribal trust lands and reservations was not significant. Speaking for the Court, the Chief Justice wrote:

> In *United States v. John,* 437 U.S. 634 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation". Rather, we ask whether the area has been " 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' " *Id.,* at 648-49; *see also United States v. McGowan,* 302 U.S. 535, 539 (1938).

Potowatomi, 498 U.S. at 511.

One final circuit level case merits mention at the conclusion of this review of Indian Country case law. In *Buzzard v. Oklahoma Tax Comm'n,* 992 F.2d 1073

(10th Cir. 1993), the Tenth Circuit revisited the Indian Country issue. In *Buzzard,* a band of Cherokee Indians who were organized as a tribe purchased fee land. Under the tribal charter, the tribe could not sell the land without federal approval. It was contended that such approval constituted sufficient federal government involvement for the land to have been validly set apart for Indians as such. The district court held that federal approval of a sale was not the equivalent of a federal set-aside of land for the tribe. The district court concluded that the land in question was not Indian Country. With nary a mention of its decision in *Martine* some twenty years previous, the Tenth Circuit affirmed.[12]

In *Buzzard,* the circuit court expressly recited the Indian Country definition of section 1151 noting that:

> In addition the Supreme Court has held that Indian country includes land " 'validly set apart for the use of Indians as such, under the superintendence of the Government.' " *Potowatomi Indian Tribe,* [498 U.S. at 511 (quoting *John,* 437 U.S. at 649)].

Buzzard, 992 F.2d at 1076. Thereafter, and without reference to the concept of a dependent Indian community, the circuit court proceeded to analyze the set-aside issue which confronted it. Pertinent to a fuller understanding of the concept of a set-aside, the Tenth Circuit observed, "land is 'validly set apart for the use of Indians as such', only if the federal government takes some action indicating that the land is designated for use by Indians." *Id.* Similarly, the Tenth Circuit observed that "[s]uper-

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[12] As discussed above, the Tenth Circuit in *Martine* held that fee land purchased by a tribe was Indian Country. Not surprisingly because it preceded *John, Martine,* while including as a factor to be considered the established practice of government agencies toward the area, does not focus the attention upon land being set aside for the use of Indian people as does *John, South Dakota,* and *Potowatomi.*

intendency over the land requires the active involvement of the federal government." *Id.* The court concluded that holding land in trust shows that the government means to exert jurisdiction over the land. Applying these views, the court concluded that the tribal land in question had not been validly set apart for the tribe's use by the federal government even though Secretarial approval of any sale was required under the tribe's charter. The land was acquired by the tribe unilaterally. The court emphasized that the land in question was acquired just as any other person might do, an apparent reference to the requirement that land be set aside for Indians *as such*.[13] After discussing how certain consequences[14] of finding Indian Country supported the conclusion that the tribal lands in *Buzzard* were not Indian Country, the court concluded with the observation that, "[n]othing in *McGowan* or the cases concerning trust land indicates that the Supreme Court intended for Indian tribes to have . . . unilateral power to create Indian country." *Id.* at 1077.

This court concludes that *Buzzard* and the United States Supreme Court cases upon which it is founded overturn *Martine* to the extent that the latter case suggests that a tribe may add to Indian Country by simply purchasing fee title to property from a private, third party. *Sandoval*, however, stands unaffected by *John* and *Potowatomi* owing to the fact that Congress declared

[13] In *Buzzard*, the Tenth Circuit continued with a discussion of whether or not the subject "land [is] superintended by the federal government." *Buzzard*, 992 F.2d at 1076. As discussed above in connection with *John*, this discussion appears misdirected; for the United States Supreme Court has said that the question of land being set aside for Indians as such is one factor and the superintendence of Indians, not land, is another factor.

[14] The court discussed as flowing from an Indian Country determination the limitation of state criminal jurisdiction (which is not a factor in the instant case) and the impact of an Indian Country determination on taxing powers of states.

the Pueblo lands to be Indian Country as a matter of federal law even though the Pueblo lands were not set aside by the federal government. This court also concludes, based upon *Potowatomi*, that it does not matter as regards the Indian Country issue whether the Neets'aii Gwich'in do or do not have a reservation. Reading *John* and *Potowatomi* together, what does matter is whether, as a matter of fact, the Neets'aii Gwich'in lands have been set aside for Native Alaskans, as such, under the superintendence of the government. To prevail, the defendants must prove, by a preponderance of the evidence, (1) that the Tribal Government holds land set apart for Alaska Natives as such, and (2) that the Tribal Government is under the active supervision of the federal government.[15]

Re-examination of Indian Country Factors

As already noted above, the prior, interlocutory decision in this case has aptly suggested that:

> [W]hether an Indian community is Indian country is quite factually dependent. It is also dependent on whether the inhabitants constitute a tribe for legal purposes, which, as we discussed earlier, is another complex factual question.

Venetie, 856 F.2d at 1391. Without reference to either *John* or *Potowatomi*, the Ninth Circuit in *Venetie* directs this court to the factors discussed above in *Martine* and *South Dakota* for purposes of resolving the factual issues raised by a claim of Indian Country. Again, these factors are, from *Martine*: (1) the nature of the area, (2) the relationship of the area inhabitants to Indian tribes and the federal government, and (3) the established practice of government agencies toward the area; and, in addition, from *South Dakota*: (1) the degree of federal owner-

[15] This court does not mean to ignore other factors relevant to a claim of Indian Country. These two factors are the dispositive aspects of this case.

ship and control of the area, (2) the degree of cohesiveness of the area inhabitants, and (3) the extent to which the area was set aside for the use, occupancy and protection of dependent Indian peoples. *See Venetie*, 856 F.2d at 1391.

This court's review and analysis of the case law of Indian Country suggest the need for some revision of these six factors which are somewhat overlapping. The court reforms, and will then apply these factors in this case as follows:

(1) the nature of the area;

(2) the relationship of the area inhabitants to one another, to Indian tribes, and the federal government;

(3) the extent to which the inhabitants and Indian tribes of the area are under the superintendence of the federal government; and

(4) the extent to which the area was set aside for the use and occupancy of Indians as such.

This court views that portion of its second factor having to do with area inhabitants as incorporating the cohesiveness concept later expressed in *South Dakota*. This court considers the third *Martine* factor (practice of government agencies toward the area) to have been subsumed by the requirement of Indian superintendence by the federal government. Finally, this court considers the degree of federal ownership and control factor from *South Dakota* to largely overlap the requirement that land be set aside for Indians, as such.

This court's formulation of factors for determining whether a tribe occupies Indian Country, on the basis of *Venetie*[16] is seen as flexible and variable. The facts of

[16] In *Venetie*, 856 F.2d at 1391, the circuit court introduced the *South Dakota* factors with the relative terms "the degree of" and "the extent to which" a factor exists.

each case are different. The concepts of cohesiveness, superintendence, dependence and the set-aside of land are not absolute terms. In the end, this court must decide whether federal government activity directed at Indians (superintendence) and whether the tribal land status (a set-aside) evinces an intention that the federal government, not the state, be the dominant political institution in the area.

One final observation concerning the foregoing factors seems in order. In analyzing this case and in particular the recent decisions of the United States Supreme Court, this court has asked itself the question: has a set-aside of land for Indians, as such, under the superintendence of the federal government become the *sine qua non* of Indian Country? Put more simply, are the other factors even relevant any more?

This court concludes, on the basis of *John* and *Potowatomi* that Indian Country cannot exist at all without proof of three elements, one of which has almost never been in contest in the Indian Country case law and therefore receives little or no mention. As is explicit in the Ninth Circuit Court's interlocutory decision in this case, a claim of Indian Country must be brought by an Indian tribe. *Venetie*, 856 F.2d at 1391. Secondly, the tribe must be under the active superintendence of the federal government. Thirdly, the tribe must have had land set aside by the federal government for its people as Natives. If the proof of the claimants to Indian Country fails as to any one of these elements, then the claim of Indian Country fails. The other factors having to do with the area and its inhabitants and their relationships to one another, the tribe and the government focus principally on geographic and demographic considerations which have relevance principally where there is some significant disagreement as to the *extent* of Indian Country as distinguished from its existence per se.[17]

[17] In this regard, the court recognizes that there is still some overlap between its factor 2 as regards the relationship of area

The court proceeds now with the analysis of whether or not the Tribal Government has established by a preponderance of evidence that its lands are Indian Country.

Application of the Indian Country Factors

In its tribal status decision, this court has made fact findings and has concluded that the Neets'aii Gwich'in are a sovereign tribe as a matter of common law. With this prerequisite having been established, the Native Village of Venetie Tribal Government, which the court finds to be the institutional pseudonym for the tribe, is entitled to bring its claim that the lands occupied by the tribe are Indian Country.

What follows is the court's fact finding and legal analysis of the Indian Country factors.

Nature of the Area [18]

In the tribal status decision, the court set out its findings with respect to the geography of the area occupied by the Neets'aii Gwich'in.[19] The Tribal Government owns a huge tract of land (roughly the size of the State of Delaware) located south of the Brooks Range, north of

residents to the federal government and factor 3 having to do with superintendence of Indian tribes by the federal government. Although the same facts may well be relevant as to both factors, the focus is different. The location of dealings between inhabitants and federal agencies may well help define the geographic extent of Indian Country where that is at issue. Where, as here, a principal issue is the extent of superintendence, the focus is upon federal activity per se—what have Congress and the Executive agencies done in relating to Native people as distinguished from where the activity has effect.

[18] Although not case dispositive, the court has determined to evaluate factors 1 and 2, nature of the area, and relationships of the area inhabitants, because they involve informative background material which will serve to establish a context for the discussion of other factors which are dispositive of the case.

[19] Tribal Status Decision, Clerk's Docket No. 142 at 34-36 in the Adoption Case, Case No. F86-0075 CV.

the Yukon River and between the east fork of the Chandalar River and the Christian River. Trial Exhibit 206.[20] The lands controlled by the Neets'aii Gwich'in are isolated. No road or railroad serves the area; however, one or more landing strips for aircraft have been constructed in the area and access to the perimeter of the area by river boat is feasible during temperate weather. While the area has, from time immemorial, been crisscrossed with trails, there are no roads within the former Chandalar Reservation. With the exception of the modest houses and a very few public buildings which serve the Neets'aii Gwich'in almost exclusively, the area is totally undeveloped. There are no mines or other natural resources extraction facilities in the area. Indeed, there is no manufacturing industry of any kind in the area; and the construction industry is dominated by government funded projects. With the exception of a few non-Native school teachers, the residents of the lands of the Neets'aii Gwich'in are all members of the tribe. By and large they reside in two communities, Arctic Village and the Native Village of Venetie.

In 1979, as a part of a settlement of Alaska Native land claims, a United States patent was issued conveying the former Chandalar Reservation to Neets'ai Corporation and Venetie Indian Corporation. The grantees received unrestricted fee title subject only to "valid existing rights".[21] The patent recites that the area consists of

[20] Plaintiff State of Alaska's exhibits are identified by letter. Defendant Tribal Government's exhibits are identified by number. The plaintiff and defendant party designations on the respective exhibit tags are reversed insofar as the position of the parties in this case because the exhibits were used in the trial of both the Adoption Case and the Tax Case. In the Adoption Case, the Tribal Government was plaintiff and the State of Alaska was defendant.

[21] Trial Exhibit 109. The village corporation of Arctic Village (Neets'ai Corporation) received an undivided 147/303 interest. The village corporation of the Native Village of Venetie (Venetie Indian Corporation) received an undivided 156/303 interest. The settlement of Alaska Native land claims is discussed hereinafter.

1,799,927.65 acres based upon a survey of the land. The area claimed to be Indian Country is readily identifiable. This same area was conveyed by warranty deeds dated September 1, 1979, from the two village corporations to the Tribal Government.[22] The evidence shows that the Neets'aii Gwich'in, while taking advantage of many health, education and general welfare programs of the state and federal governments, prefer and by and large continue to follow a traditional, subsistence lifestyle. The lands controlled by the Tribal Government are well suited to serving and supporting a subsistence lifestyle. The Neets'aii Gwich'in in fact use the area in question for this purpose.

Relationship of the Area Inhabitants to One Another, to Indian Tribes, and to the Federal Government

Analysis of the tribal status of the Neets'aii Gwich'in required this court to consider whether they were a group united in a community and whether the group is under one leadership or government.[23] The second factor pertinent to a finding of Indian Country involves similar considerations: here we consider the cohesiveness of the area inhabitants, their relationship to the tribe and their relationship to the federal government. The relationships with the federal government will have only slight mention here, for in this case that subject is more properly a part of the question of whether or not the tribe and its members are under federal government superintendence.

In connection with this Indian Country decision, the court sees only a modest need to augment its previous findings as regards the relationship of the Neets'aii Gwich'in amongst themselves and to their tribe. Summarizing those earlier findings, and for purposes of this

[22] Trial Exhibit 106.

[23] Tribal Status Decision, Clerk's Docket No. 142 at 31 in the Adoption Case, Case No. F86-0075 CV.

Indian Country decision, the court finds that the Neets'aii Gwich'in are a cohesive community. All but a few residents of the area (notably school teachers) are Alaska Natives and members of the tribe. They have at all times relevant to this case, right down to the present, voluntarily come together for purposes of forming their own traditional councils which have provided for the protection and welfare of the whole community. The fact that the Neets'aii Gwich'in have chosen to recognize subcommunities in the form of the Native Village of Venetie and Arctic Village as well as an umbrella organization which acts on behalf of the whole tribe does not detract from the community or cohesiveness which the court finds to exist between the members of the tribe. The court further finds that there are no other meaningful political institutions formed by either the people of the tribe or anyone else in the area.

The Neets'aii Gwich'in have significant contacts and relationships with numerous agencies of the state and federal government. The state as well as the federal government provide and/or fund significant health, education and welfare projects and services for the area in question. The Neets'aii Gwich'in have actively participated in various governmental programs which involve applying for and administering grants. Substantial interaction by the tribe and its members with the State of Alaska, including the providing of significant services by the State of Alaska, is not inconsistent with a finding of Indian Country if all of the elements of such are proven.[24]

Finally, as suggested above and discussed in the tribal status decision,[25] the Neets'aii Gwich'in are the modern

[24] "[T]he provision of state services to Indians would not prove that the Federal Government had relinquished its ability to provide for those Indians under its Article I power." *John*, 437 U.S. at 652 n.23.

[25] Tribal Status Decision, Clerk's Docket No. 142 at 48-51 in the Adoption Case, Case No. F86-0075 CV.

successor to the historic tribe. The traditional councils and Tribal Government which operate today have their roots in the pre-contact tribe. Despite significant contact with non-Native state and federal institutions, assimilation is not underway to any significant degree. Arctic Village and the Native Village of Venetie and their environs are today a distinctly Native community. The fact that some tribal members may live and work elsewhere or seek education elsewhere does not in any significant, measurable degree detract from the cohesiveness and community which the court finds to exist amongst the Neets'aii Gwich'in people.

Extent to Which the Inhabitants and Indian Tribes of the Area are Under the Superintendence of the Federal Government

The court examines next the third factor which must be established by a preponderance of the evidence for Indian Country to exist: the tribe claiming to occupy Indian Country must be under federal superintendence. This concept brings into play the "dependent" component of the second form of Indian Country defined by 18 U.S.C. § 1151(b). It is in this area that the case law developed above becomes most important.

The concept of dependence as regards American Indian tribes in fact pre-dates *Sandoval*. In the course of formulating the relationship which would exist beween the United States and Indian tribes, Chief Justice Marshall in *Cherokee Nation v. Georgia*, 30 U.S. 1, 21 (1831), characterized Indian tribes as "domestic dependent nations." In *Cherokee Nation* as well as *Worcester v. Georgia*, 31 U.S. 515 (1832), Chief Justice Marshall used much language which is familiar to us even today as regards Indian tribes and their relationship to the federal government. As discussed in detail above, the Supreme Court spoke again of dependent Indian communities in *Sandoval*, 231 U.S. at 46; and here also the focus of

the discussion was the relationship between distinctively Indian communities and the federal government, in particular Congress, which has the primary obligation of determining for what period of time and to what extent Indian tribes shall remain under the guardianship and protection of the United States. *Id.* In *John* and *Potowatomi*, the Supreme Court has used different words—speaking of superintendence of Indian tribes by the United States, but the substance of the concept is the same.

In briefing this issue for the court, the parties have discussed whether dependence should be viewed in an economic or a political context. The foregoing (especially *Sandoval* and *John*) shows that the focus should be political. As the dominant sovereign entity, it is for the federal government to determine for what time and to what extent tribes will be supervised. That is a political consideration. The court does not suggest that the economic relationship between the federal government and a tribe is irrelevant. Benefits provided to tribes by the federal government are some evidence of a congressional determination to continue superintendence. Our inquiry is the broader one of the totality of the interaction (the political relationship) between the federal government and the tribe wherein the focus is upon how the federal government conducts itself toward the tribe, not the reverse. Superintendence by the federal government, and the consequential political dependence on the part of the tribe, exists for purposes of section 1151(b) where the degree of congressional and executive control over the tribe is so pervasive as to evidence an intention that the federal government, not the state, be the dominant political institution in the area.[26]

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[26] "[T]he Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands." *Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 973 (10th Cir. 1987). The foregoing quotation is followed by a litany of authorities including Felix S. Cohen, *Handbook of Federal Indian Law* 5-8

The court has already discussed some of the facts proved at trial relevant to this inquiry. Those will now be reiterated and the court's further findings pertinent to federal superintendence in this case follow.

From early in this century, there has been contact between Executive agencies of the United States Government and the Neets'aii Gwich'in. Educational and health services came early. The Bureau of Indian Affairs operated a school at Arctic Village until 1970 and at Venetie until 1984. Testimony of Tozer, ¶ 4. Although it receives some federal aid for schools, the State of Alaska now operates the schools at Arctic Village and Venetie. *Id.*, ¶ 5. Health care in the area is now provided through the integration of various state and federal programs.

There is a long history of political intercourse between the tribe and the Bureau of Indian Affairs. The Native Village of Venetie obtained one of the earlier Indian Reorganization Act approved constitutions.

While there continues to be considerable interaction between federal agencies and the tribe, the evidence shows a change of some significance in the mode of providing these services. To a significant degree, federal largess is now available in the form of grants and other programs which are administered by Native people themselves with general oversight by agencies as opposed to direct agency

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(1942) ("Indian country" generally determines allocation of tribal, federal, and state authority). *See also* Op. Solic. Dep't Interior, M-36975 (Jan. 12, 1993) at 116, where the Solicitor opines that:

> [W]e repeat the guiding principle that Indian country comprises those lands that Congress intended, as a general matter, to be beyond the jurisdictional reach of the state and subject to the primary jurisdiction of the Federal Government and tribes, even though those lands are geographically within the boundaries of a state.

services to the tribe.[27] The State of Alaska has also funded similar projects.[28]

Until 1971, there is little doubt but what the Neets'aii Gwich'in were treated by Congress and the Executive agencies as being subject to active superintendence to such a degree as to amount to a dependent Indian community for purposes of 18 U.S.C. § 1151(b). In 1971, as a part of the settlement of claims to aboriginal title to land and hunting and fishing rights, Congress enacted the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601, *et seq.* (ANCSA), and thereby effected a significant change in relationship as between the federal government and Alaska Natives. The legal and factual history of Alaska Native land claims was discussed extensively and was published by Judge Fitzgerald of this court in *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1014 (D. Alaska 1977), *aff'd on appeal* 612 F.2d 1132 (1980).

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[27] Federal grants have been approved for an airport at Arctic Village, Trial Exhibit 127, a 29-unit housing project at Venetie, Trial Exhibit 118, water and wastewater systems at Arctic Village and Venetie, Trial Exhibits 155, 156, housing renovation at Venetie, Trial Exhibit 155, and a self-governance project. Trial Exhibit 163 at 12. There were other similar federal grants as well.

[28] State grants have beeen approved for community halls and health clinics at Arctic Village and Venetie, replacement or repair of federally funded water systems, Testimony of Capito, ¶¶ 3-4, power generating equipment, and electric distribution systems, Testimony of Bavard, ¶ 3(a) and (b), Testimony of Manni, ¶¶ 7-8. The state has twice replaced power generating equipment originally installed with state money at Venetie, Testimony of Manni, ¶¶ 2, 3, 5, and has similarly replaced construction equipment lost in a fire. Testimony of Crommett, ¶¶ 2-4. The State of Alaska subsidizes the operation of electric utilities, Testimony of Manni, ¶¶ 6, 9, makes general revenue sharing grants to unincorporated communities such as Arctic Village and Venetie for general public purposes, Testimony of Rolfzen, ¶ 2, provides public assistance payments and unemployment insurance payments, Testimony of Randy Moore, ¶¶ 2, 3, Testimony of Sturrock, ¶ 3, and regulatory and law enforcement activities. For example, Testimony of Justice, ¶¶ 2, 3, 5, and Testimony of Stearns, ¶¶ 2-6.

In declaring a settlement with Alaska Natives, Congress expressly provided that all prior conveyances of public lands, including tentative approvals of lands under the Alaska Statehood Act, constituted an extinguishment of aboriginal title. 43 U.S.C. § 1603(a). Congress abolished all other aboriginal land titles including those with respect to submerged lands as well as aboriginal hunting and fishing rights. 43 U.S.C. § 1603(b). Finally, in extremely broad language, Congress extinguished all claims based on claims of aboriginal title or based on any statute or treaty of the United States relating to Native use and occupancy of land. 43 U.S.C. § 1603(c).[29]

In exchange for all of the abrogated rights, Congress made provision for land grants totalling 44 million acres and the payment of over 962 million dollars. 43 U.S.C. §§ 1613, 1605, 1608(g). The land grants went to neither individual Natives, tribes, nor other Native organizations such as Indian Reorganization Act entities. Rather, Congress required the formation of regional and village, state law, "business for-profit" corporations which would take title to land and receive the settlement funds. 43 U.S.C.

[29] In studying this case, the court became concerned over the role, if any, that the congressional extinguishment of claims might have with respect to a claim of Indian Country. Supplemental briefing was requested and received. The court is now satisfied that no issue in this case is resolved by section 1603(c). The Tribal Government does not and could not successfully claim the area in question to be Indian Country based upon aboriginal title. Section 1603(c) extinguishes all direct claims "against . . . the State . . . based on claims of aboriginal right, title, use, or occupancy of land. . . ." Not so clear was the question of whether section 1603(c) extinguished the Tribal Government's claim of Indian Country based upon 18 U.S.C. § 1151(b). Section 1603(c) also extinguished "[a]ll claims against . . . the State . . . based on any statute . . . relating to Native use and occupancy. . . ." The court has concluded that although 18 U.S.C. § 1151(b) defines Indian Country, it is in substance part of a jurisdictional statute. Section 1151(b) does not deal directly with the subject of who may use or occupy land. Section 1603(c) did not extinguish the claim of the Tribal Government that its lands are Indian Country.

§§ 1606(d), 1607(a).[30] Somewhat oversimplified, the regional corporations took fee title to the bulk of the land and ownership of the subsurface of village lands. Village corporations took surface title only to the lands immediately surrounding the village.

Also as a part of the statutory reorganization of the relationship between the federal government and Alaska Natives, Congress revoked all reservations in Alaska, whether created by Congress or the Executive Branch, with the exception of that on Annette Island for the Metlakatla Indian community. 43 U.S.C. § 1618(a).[31] ANCSA does, however, contain a special provision applicable to Alaska Natives whose reservations were revoked. By section 1618(b), ANCSA permitted members or stockholders of village corporations which previously had the benefit of a reservation to vote that their *corporation* take fee title to the former reservation lands. As discussed in somewhat more detail in a following section of this decision, Arctic Village and the Native Village of Venetie formed village corporations and their shareholders voted to take fee title to the former Chandalar Reservation in lieu of other ANCSA benefits.

This foregoing corporate model for a resolution of Native land claims was, of course, a dramatice departure from prior Indian settlements approved by Congress. Although some have apparently viewed ANCSA as a termination act, the court shares the view of the Secretary of the Department of the Interior who has opined that ANCSA is not "a termination statute that forecloses the exercise of all governmental powers by Native villages." [32] Rather, ANCSA is a new Native self-determination act.

[30] Villages were permitted to choose between "business for profit or nonprofit" state law incorporation. 43 U.S.C. § 1607(a).

[31] In a parallel provision, 43 U.S.C. § 1617(a), the Indian Allotment Act was repealed as to Alaska, except as to pending allotment applications.

[32] Op. Solic. Dep't Interior, M-36975 (Jan. 12, 1993) at 101; 104.

Whereas a prior termination effort sought to scatter Indians and Indian land holdings by allotting out reservations to individuals, the corporate settlement model leaves Alaska Natives with collective control of their lands and what should be done with them. That control is by and large in the hands of a board of directors, a management group made up from the Native communities themselves who must exercise collective judgment as to how to deal with the land grants and money. The federal government no longer has any right or responsibility for the active supervision of Alaska Natives with respect to the lands which they occupied after extinguishment of aboriginal titles. The court finds that this corporate model effects a significant diminution of the power of Congress and the Executive agencies over Alaska Native tribes.

There is more. In addition to setting up a structure which largely freed Alaska Natives from congressional and Executive agency dominance as regards land and money, Congress was quite explicit in stating its policy reasons for choosing the mode of settlement which was effected. In ANCSA, Congress has found and declared that:

> [T]he settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska.

43 U.S.C. § 1601(b).

Several aspects of the foregoing policy declaration are most pertinent to this court's analysis of the relationship

between the federal government (Congress in particular) and Alaska Native tribes. Firstly, Congress sought to maximize the participation of Natives in decisions affecting their rights and property. This strongly suggests a shift from government superintendence to self regulation. This declaration of policy suggests tribal independence, not dependence. Secondly, Congress negated the establishment of permanent, racially defined institutions. This, too, bespeaks the intent of Congress to draw back from its historic role of adopting substantial legislation under the Indian Commerce Clause. U.S. Const. art. I, § 8, cl. 3. As a legal entity or person, corporations are race neutral. Tribes are by definition race oriented. Thirdly, the policy declaration disowns the reservation system which had been the centerpiece of the relationship between Congress and Indian tribes since the middle of the 19th century. Finally, and perhaps most notable, Congress expressly declared its intention not to have an ongoing "wardship or trusteeship" relationship with Alaska Native tribes. In very simple terms, a "ward" is, "[a] person, especially a child, or incompetent, placed by the court under the care of a guardian." *Black's Law Dictionary* 1420 (5th ed. 1979). In terms of Indian law, Indian people and tribes have long been considered incompetent to manage their own affairs and property without the superintendence of Congress and Executive Branch agencies. By the foregoing declaration of policy, Congress has clearly said, no more! Congress now means for Alaska Natives to have "maximum participation . . . in decisions affecting their rights and property . . . without . . . [a] wardship or trusteeship." 43 U.S.C. § 1601(b).

It is been pointed out that ANCSA does not once mention the term "Indian Country." The court supposes, but does not know because the legislative history of ANCSA is uninstructive, that Congress deliberately, and no doubt for political reasons, left unresolved the Indian Country question which the court now decides. That

the Indian Country issue was not expressly resolved by ANCSA does not detract from the fact that ANCSA unmistakably affects the balance of power (the degree of dependence and superintendence) in the relationship between the federal government and Native tribes: and Congress is presumed to have known that it was affecting that relationship by the adoption of ANCSA.[33]

Other congressional acts, both pre-dating and post-dating ANCSA, have relevance to the court's appraisal of the degree of dependence and/or superintendence which

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[33] It is appropriate to here observe that when Congress revisited the Settlement Act for purposes of the Alaska Native Claims Settlement Act amendments of 1987, Pub. L. No. 100-241, Feb. 3, 1988, 100 Stat. 1788, it exercised great care to make it clear that the amendatory act was not to tilt the scale one way or the other as regards the Indian Country issue. Section 17 of the amendments act provided that:

> (a) No provision of this Act (the Alaska Native Claims Settlement Act Amendments of 1987) . . . shall be construed to validate or invalidate or in any way affect—
>
> (1) ...
>
> (2) any assertion that Indian country (as defined by 18 U.S.C. 1151 or any other authority) exists or does not exist within the boundaries of the State of Alaska.

Pub. L. No. 100-241, § 17(a), Feb. 3, 1988, 101 Stat. 1814. The published legislative history on the amendments of 1987 further underscore the intent of Congress that, "[t]his is an issue which should be left to the courts in interpreting applicable law and that these amendments should play no substantive or procedural role in such court decisions." S. Rep. No. 201, 100th Cong., 1st Sess. 23 (1987), *reprinted in* 1987 U.S.C.C.A.N. 3269, 3274. Similarly, the House of Representatives' explanatory statement with respect to the amendments of 1987 indicate an intention that the amendments "should be scrupulously neutral" on the question of tribal powers or self government. H.R. Explanatory Statement, 100th Cong., 1st Sess. 1 (1987), *reprinted in* 1987 U.S.C.C.A.N. 3269, 3299.

Clearly, Congress understood that this court would in the first instance decide the Indian Country issue based on all of the pertinent facts. This court is not, however, to be influenced in that decision by reason of Congress having amended ANCSA.

exists now as between the federal government and Alaska Native tribes.

Firstly, as to Alaska and a relatively few other states, Congress has made special provision for state civil and criminal jurisdiction with respect to Indians. In 1958, the Territory of Alaska was added to California, Minnesota, Nebraska, Oregon and Wisconsin as jurisdictions in which 28 U.S.C. § 1360 would have application. Under section 1360(a),

> Each of the States listed in the following table [which includes Alaska] shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

Similarly, 18 U.S.C. § 1162(a) provides in pertinent part:

> Each of the States or Territories listed in the following table [which again included Alaska as of 1958] shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

Thus, even if this court were to conclude that the lands of the Neets'aii Gwich'in were Indian Country, Congress had long before the adoption of ANCSA determined that there was no need in Alaska to protect Alaska Natives

from the imposition of state civil and criminal law. The evidence shows that Village Public Safety Officers and Alaska State Troopers, not federal authorities, provide law enforcement in the area at issue here. In Alaska, there is not and, since 1958, has not been the exclusivity of protection for Alaska Natives under the jurisdiction of federal authorities that previously existed and still exists in many of the western states as to Indians.

In 1980, Congress adopted the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101. ("ANILCA")[34] Pertinent to the matter before this Court, title VIII of ANILCA, 16 U.S.C. § 3111, made extensive provision for subsistence hunting and fishing rights in Alaska. In enacting ANILCA, Congress invoked both its "constitutional authority over Native affairs" as well as its "constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on public lands by *Native* and *non-Native* rural residents" of Alaska. 16 U.S.C. § 3111(4). The court emphasizes here that the subsistence hunting and fishing rights were enacted in a fashion true to the declared policy of ANCSA that Congress would in the future avoid the creation of racially defined institutions. ANILCA was enacted for the benefit of all rural Alaskans, not just Native Alaskans.[35]

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[34] ANCSA contemplated that there would be an Alaska lands act, the matter sometimes being referred to as the "D2" legislation. 43 U.S.C. § 1616(d)(2). Congress worked on the D2 legislation almost continuously from the enactment of ANCSA until the legislation was completed in 1980.

[35] The court does not mean to suggest that Congress has, since the adoption of ANCSA, evidenced an intention to abandon totally its Article I, Section 8 constitutional power to legislate with respect to Alaska Natives. Subsequent to the enactment of ANCSA, Congress has also had occasion to adopt or amend other federal laws for the benefit of Indians and has extended those laws to Alaska Natives. For example, the Indian Child Abuse and Family Violence Prevention Act, 25 U.S.C. § 3201, *et seq.*, is made applicable in Alaska by expansion of the definition of the term "Indian Reservation" for purposes of this Act to include among other entities, "village corporations under the provisions of the Alaska Native Claims Settlement Act. . . ." 25 U.S.C. § 3202(9). By contrast, the Indian Land Consolidation Act, 25 U.S.C. § 2201, *et seq.*, unmistakably omits ANCSA corporation lands from that Act. 25 U.S.C. § 2201.

As discussed previously, the evidence shows that the village corporations created by Arctic Village and the Native Village of Venetie conveyed their ANCSA lands to the Native Village of Venetie Tribal Government. The latter now contends that the tribe's lands have become subject to federal government control by virtue of the prohibition upon alienation contained in 25 U.S.C. § 177.[36] Assuming without deciding that the lands in question may be subject to a restraint on alienation, that circumstance is most certainly not controlling on the superintendence issue; and it is not even significant evidence of a reassertion of such superintendence. The conveyance from the ANCSA village corporations to the tribe was not joined in nor approved by the federal government. The title transfer was the voluntary act of the corporations. The Tenth Circuit Court of Appeals rejected just such an argument in *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d at 1076. In *Buzzard*, land acquired by the tribe in fee but subject to a tribal charter provision which prohibited disposition of land without approval of the Secretary of the Department of the Interior was held not to amount to the kind of "active involvement of the federal government" required for "superintendence" as that term is employed in *Potowatomi* and *John*. *Id.* Also apposite to the instant case, the court in *Buzzard* observed that the tribe there had acquired the land "unilaterally". *Id.* As hereinabove discussed, the focus of the court in *Buzzard* and by this court

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[36] *See also* 25 U.S.C. § 476 and the Corporate Charter of the Native Village of Venetie, Trial Exhibit 20, Charter documents at 1, § 5.

is upon what Congress and the Executive agencies have imposed by way of superintendence of Natives. Superintendence cannot be imposed or created by the tribe.

Finally, this court is not unmindful of an earlier, unpublished decision of this court in *Chilkat Indian Village v. Johnson*, Order of October 9, 1990, Case No. J84-0024 CV, Clerk's Docket No. 257. The *Chilkat* situation was not markedly different from that presented by the Tribal Government in this action.[37] This court held the Chilkat Indian Village to be a dependent Indian community. In discussing the declaration of policy of ANSCA, the *Chilkat* decision observed that:

> While the preamble speaks to a desire not to *establish* certain rights, nothing in the preamble indicates a "clear and plain" intention to *extinguish* Chilkat Indian Village's dependent status as it existed prior to the passage of ANCSA.

Chilkat, Opinion at 15 (emphasis in original).

Chilkat did not employ the detailed factual analysis called for by *Native Village of Venetie v. Alaska*, 856 F.2d at 1391. The question now before the court is not whether the declaration of policy contained in ANCSA in and of itself extinguished tribal dependency. Rather, considering all of the evidence as to the factors relevant to the dependent status issue, we inquire as to whether or not the totality of those circumstances are such as to

[37] The Chilkat Indian Village lands were originally a reservation, title to which was obtained by ANCSA village corporation Klukwan, Inc., pursuant to 43 U.S.C. § 1618(b). By amendments to ANCSA, Congress overruled the election to take title to the reservation in preference to other ANCSA rights. Congress allowed the Native Village of Klukwan to make land selections as generally permitted by ANCSA on the condition that Klukwan, Inc. would quitclaim the former reservation lands to the Indian Reorganization Act entity, Chilkat Indian Village. 16 U.S.C. § 1615 (d) (1). *See also* S. Rep. No. 1170, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.S.C.A.N. 4285, 4287.

constitute the tribe as one subject to federal government superintendence which is so pervasive as to evidence an intent by the federal government to be the dominant political institution in the area claimed to be Indian Country.

On the evidence produced at the trial of this case, and for the reasons discussed above, this court now finds that the Neets'aii Gwich'in, although a tribe, are not a dependent Indian community. The federal government no longer exercises that level of active superintendence necessary to evidence an intent to be the dominant political institution in the area in question to the exclusion of the state.

Extent to Which the Area was Set Aside for the Use and Occupancy of Alaska Natives

As the foregoing discussion has perhaps suggested, the differentiation between federal superintendence of a tribe and the question of whether land has been set aside for the tribe as such is a bit artificial. The two subjects are closely related. The court has separated the discussion by and large to bring into focus its conclusion that the issue of superintendence as discussed above has to do with the relationship between the federal government and the tribe, not the position of the federal government with respect to land only.

The Neets'aii Gwich'in have inhabited the lands in the vicinity of the Chandalar River since before recorded history. The Neets'aii Gwich'in, through their I.R.A. Council, obtained a reservation in 1943.[38] Unquestionably, this land was set aside for the Neets'aii Gwich'in as Native people.

As we have found above, this set-aside of land no longer exists; for the Chandalar Reservation was revoked by ANCSA. The land was in essence reclaimed by the federal government free of the reservation. That same

[38] Trial Exhibit 27.

land was in due course conveyed away not to an Indian tribe, not to an I.R.A., and not to individual members of the tribe. Rather, through ANCSA, Congress required that Native people form corporations and it was to two such corporate entities that Congress directed the land in question to be conveyed as a part of the congressional settlement of aboriginal land claims with Alaska Natives.

Being dissatisfied with the corporate mode of dealing with their land, the residents of Arctic Village and the Native Village of Venetie as shareholders of those village corporations voted to transfer their land to the Native Village of Venetie Tribal Government The land was in fact transferred and the ANCSA village corporations were dissolved.[39] The lands in question are now owned in fee by the Native Village of Venetie Tribal Government. These lands are not subject to any trust arrangement for the benefit of the Tribal Government.[40] The federal government has no ownership interest whatever in the lands which are here claimed to be Indian Country.

The court finds that by conveying unrestricted fee title to settlement lands to the Neets'aii Corporation and Venetie Indian Corporation, the federal government through ANCSA intended and in fact effected "maximum participation by Natives in decisions affecting their rights and property". 43 U.S.C. § 1601(b). By instituting a corporate model for the settlement, Congress chose a racially neutral form of ownership. This court finds that the conveyance of lands by the federal government to village business corporations was not intended to be and in fact was not a set-aside of lands "for the use of Indians

[39] Trial Exhibits 106, 117. These village corporations were business as opposed to non-profit corporations.

[40] There was testimony that the village corporations endeavored to return their land to trust status with the federal government. That proposition was rejected by the Solicitor of the Department of the Interior on the basis of ANCSA. Trial Exhibit 102.

as such. . . ." *John*, 634 U.S. at 649 (emphasis added). The court is not aware of any court having ever held that a government patent conveying fee title to a corporate entity (even one controlled by Indians) constituted a set-aside for Indians as such.[41] The Native Village of Venetie Tribal Government had the right to acquire the land in question from the village corporations; but that unilateral decision of those corporations and the tribe (both of which are controlled by the Neets'aii Gwich'in) did not constitute "action . . . by the federal government indicating that it set aside the land for use by the . . . [tribe as such]." *Buzzard*, 992 F.2d at 1076. The lands of the Neets'aii Gwich'in do not meet the set-aside factor necessary to support a finding that the Neets'aii Gwich'in are a dependent Indian community.

Conclusion

In summary, this court finds that the lands of the Neets'aii Gwich'in have not been set aside for Alaska Natives, as such, under the superintendence of the federal government. The court concludes that the Neets'aii Gwich'in, although a tribe, are not a dependent Indian community for purposes of 18 U.S.C. § 1151(b).

Based upon the court's above findings, this court concludes that the lands of the Neets'aii Gwich'in are not Indian Country; and, therefore, the Tribal Government does not have the power to impose a tax upon non-members of the tribe such as the plaintiffs.

DATED at Anchorage, Alaska, this 2nd day of August, 1995.

/s/ [Illegible]
United States District Judge

[41] While this court thinks the Tenth Circuit would decide Martine differently today, even that case involved a tribe acquiring fee land from third parties which was adjacent to Indian Country—an extant reservation. The Tribal Government in our case occupies no Indian Country whatsoever if the land it obtained from the village corporations is not Indian Country.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. F86-0075 CIV (HRH)

NATIVE VILLAGE OF VENETIE I.R.A. COUNCIL, *et al.*,
Plaintiffs,

vs.

STATE OF ALASKA, *et al.*,
Defendants.

No. F87-0051 CIV (HRH)
(consolidated)

STATE OF ALASKA, *ex rel.*,
YUKON FLATS SCHOOL DISTRICT
UNALAKLEET/NEESER CONSTRUCTION JV, *et al.*,
Plaintiffs,

vs.

NATIVE VILLAGE OF VENETIE TRIBAL
GOVERNMENT, *et al.*,
Defendants.

ORDER
(Decision—Tribal Status)

An Indian tribe is a sovereign entity. It is entitled to regulate tribe members. *Montana v. United States*, 450 U.S. 544, 564 (1981). Within Indian country, a tribe often retains the power to regulate third parties as well as its members. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980).

In these consolidated cases, the court deals with two specific government-to-government conflicts between the Native Village of Venetie I.R.A. Council,[1] *et al.* and the Native Village of Venetie Tribal Government, on the one hand, and the State of Alaska on the other hand. The Venetie Council claims the right to exercise jurisdiction over the residents of Venetie, Alaska, with respect to adoptions.[2] The Tribal Government sought to impose a gross receipts tax upon a construction contractor employed by the State of Alaska to build a school in Venetie.[3] Thus, the court has one case raising a question of the power of the Venetie Council over its own people and another raising a question of the power of the Tribal Government over third parties. The former dispute raises an issue as to the tribal status; and the latter raises both the question of tribal status and the question of whether the lands of the Tribal Government are Indian country.

This pair of questions—tribal status and Indian country—have nagged at American government generally since the American Revolution and the formation of the federal government in 1789. For Alaska, the issue of the

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[1] Hereinafter, when the court refers to "Venetie" and "Arctic Village", the court means to have reference to the town sites of Venetie or Arctic Villege and/or the people of those communities. By "Venetie Council", the court refers to the plaintiff, Native Village of Venetie I.R.A. Council. By "Tribal Government", the court refers to defendant, Native Villege of Venetie Tribal Government.

[2] Plaintiffs' Complaint, ¶ 8, and Complaint Exhibit 1, Clerk's Docket No. 1, case F86-0075 CV.

[3] Plaintiffs' Complaint, ¶ 1, Clerk's Docket No. 100, case F87-0051 CV.

status of "native tribes" has its origins in the Treaty of Cession with Russia which provided in Article III:

> The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

Ratified May 28, 1867, and Proclaimed June 20, 1867, 15 Stat. 539, 542. As we shall see in this discussion on tribal status, and in a subsequent decision on Indian country, Congress has never fully dealt with the question of the status of native groups in Alaska. Not until after Atlantic Richfield Company discovered a huge oilfield on Alaska's "north slope" of the Brooks Range and native groups blanketed the proposed right-of-way for a trans-Alaska oil pipeline with claims of aboriginal ttile, did Congress take direct action aimed at resolving the question of the status of the aboriginal inhabitants of what came to be the state of Alaska.

In 1971, Congress adopted the Alaska Native Claims Settlement Act (ANCSA).[4] ANCSA abolished all aboriginal titles in Alaska,[5] and abolished all but one of the very few Indian reservations that then existed in Alaska[6] as a part of a settlement of the native land claims which

[4] 43 U.S.C. § 1601.

[5] 43 U.S.C. § 1603.

[6] 43 U.S.C. § 1618(a).

blocked the granting of a right-of-way for the construction of the trans-Alaska pipeline. In ANCSA, Congress did only what had to be done in order to free land for the pipeline corridor. Congress did not then address, and has not since resolved, the issue of tribal status or Indian country in Alaska. Rather, these important issues have been relegated to this court which, unlike Congress, cannot legislate—cannot say *what should be*. Thus it is that the court undertakes to determine *what is* the tribal status of native groups in Alaska. This opinion constitutes the court's decision with respect to the tribal status of the residents of Venetie and Arctic Village, Alaska. A subsequent opinion will address the question of whether or not Venetie and Arctic Village, and their environs, are Indian country.

I. Case History

Venetie and Arctic Village are located at the southern edge of the Brooks Range in north-central Alaska. Venetie is situated on the banks of the Chandalar River, some 30 miles above the confluence of the Chandalar and Yukon Rivers. Arctic Village lies to the north, on the banks of the East Fork of the Chandalar River, a few miles downstream from where it emerges out of a deep valley in the Brooks Range. Fort Yukon is located on the Yukon River, some 70 air-miles southeast of Venetie.

A. The Adoption Case

The Native Village of Venetie I.R.A. Council, the Native Village of Fort Yukon I.R.A. Council, and private individuals commenced case F86-0075 CV for purposes of testing the legal enforceability of orders for adoption of children entered by the village courts of Venetie and Fort Yukon ("Adoption Case").[7] State officials had declined to acknowledge village adoption orders for purposes of the issuance of substitute birth certificates and aid to families with dependent children ("AFDC") benefits.

[7] Clerk's Docket No. 1, case F86-0075 CV.

Plaintiff Nancy Joseph is an Athabascan Indian from the Native Village of Fort Yukon. One of Joseph's relatives, an expectant mother, asked Joseph to adopt her baby following the child's birth. Joseph agreed, and took the child home from the hospital shortly after his birth on February 24, 1986.

Inasmuch as the child's natural mother was from Venetie, she consented to the adoption in Venetie's tribal court. Joseph subsequently requested a substitute birth certificate from the State of Alaska showing her to be the child's mother. The Bureau of Vital Statistics of the State of Alaska denied the request, stating that its policy was to not recognize native or tribal council adoption orders.

In June, 1986, Joseph applied for AFDC benefits. On October 20, 1986, the Division of Public Assistance denied her application because it did not recognize the adoption of her child. She was directed to reapply if she could provide proof that the State of Alaska had recognized the adoption.

On May 13, 1988, Judge Kleinfeld published a lengthy decision in the Adoption Case, 687 F.Supp. 1380 (D. Alaska 1988). Deciding cross-motions for summary judgment, Judge Kleinfeld held that the Eleventh Amendment did not bar the Adoption Case, that village courts did not have exclusive jurisdiction of adoption matters under the Indian Child Welfare Act, 25 U.S.C. § 1918, *et seq.*, and that village courts could not exercise concurrent jurisdiction over adoptions due to the fact that they had not petitioned for nor received authority to resume jurisdiction over adoption matters. The State's motion for summary judgment was granted and the plaintiffs' complaint dismissed. The plaintiffs appealed.

Of importance to the matter now before the court in the Adoption Case, the Ninth Circuit Court of Appeals held that:

> [A]n Indian tribe need not wait for an affirmative grant of authority from Congress in order to exercise dominion over its members.

Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 556 (9th Cir. 1991).[8] The Ninth Circuit Court also held that:

> In accordance with this doctrine of inherent tribal sovereignty, it follows that Indian groups to be recognized as sovereigns should be those entities which historically acted as bodies politic, particularly in the periods prior to their subjugation by non-natives. There is, however, an additional prerequisite that an Indian group must meet in order to achieve present-day recognition as a sovereign: the modern-day group must demonstrate some relationship with or connection to the historical entity. . . . "[T]ribal status is preserved," we held, "if some defining characteristic of the original tribe persists in an evolving tribal community." [*United States v. State of Washington*, 641 F.2d 1368 (9th Cir. 1981)] at 1372-73.
>
> This requirement has been interpreted liberally in favor of Indian groups. "[C]hanges in tribal policy and organization attributable to adaptation do not destroy tribal status." *Id.* at 1373. We have been particularly sympathetic to changes wrought as a result of dominion by non-natives. . . . In general, we have continued to recognize tribal existence unless the tribe has voluntarily sought, and achieved, assimilation into non-Indian culture. *See State of Washington*, 641 F.2d at 1373.

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[8] The Ninth Circuit Court had rendered an earlier decision, *Native Village of Venetie I.R.A. Council v. State of Alaska*, 918 F.2d 797 (9th Cir. 1990), which opinion was withdrawn upon issuance of the September 12, 1991, decision. Part II-B of this earlier opinion was revised to reflect an intervening decision of the United States Supreme Court with respect to the Eleventh Amendment issue. *Blachford v. Native Village of Noatak*, 501 U.S. 775 (1991).

Id. at 557. Summing up the foregoing, the Ninth Circuit Court held:

> Indian sovereignty flows from the historical roots of the Indian tribe. . . . Thus, to the extent that Alaska's natives formed bodies politic to govern domestic relations, to punish wrongdoers, and otherwise to provide for the general welfare, we perceive no reason why they, too, should not be recognized as having been sovereign entities. If the native villages of Venetie and Fort Yukon are the modern-day successors to sovereign historical bands of natives, the villages are to be afforded the same rights and responsibilities as are sovereign bands of native Americans in the continental United States.
>
> We cannot say on this record, however, whether the predecessors of the native villages of Venetie or Fort Yukon formed such bodies politic. Nor can we say whether Venetie or Fort Yukon can sufficiently trace their origins to such an identifiable historical sovereign that it should be considered the modern-day successor to such an entity. Answers to these questions must be provided, in the first instance, by the district court.

Id. at 558-9 (citations omitted) (footnotes omitted).[9]

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[9] Relevant to this court's decision to render separate opinions on the tribal status and Indian country issues which are before the court, Judge O'Scannlain observed in a footnote to the first paragraph quoted above that, "tribal sovereignty is not coterminous with Indian country. . . . Rather, tribal sovereignty is manifested primarily over the tribe's members. . . . A tribe's authority over its reservation or Indian country is incidental to its authority over its members." *Native Village of Venetie*, 944 F.2d at 558-59 n.12 (citations omitted). In the interest of advancing the Adoption Case, which involves only potential tribal power with respect to tribal members, the court has decided to issue two separate opinions, one on the issue of tribal status and the other on the issue of Indian country.

The Ninth Circuit Court reversed that part of the district court decision granting the State's motion for summary judgment and directed that:

> On remand, the district court must determine whether the native villages of Venetie and Fort Yukon are the modern-day successors to an historical sovereign band of native Americans. If the district court determines that either village is a successor to such a sovereign, it must provide the relief necessary to ensure that the state of Alaska affords full faith and credit to adoption decrees issued by the tribal courts of the native village.

Id. at 562.

B. The Tax Case

The State of Alaska, on behalf of the Yukon Flats School District and others, commenced case F87-0051 CV seeking declaratory and injunctive relief challenging the jurisdiction or authority of the Native Village of Venetie Tribal Government, *et al.* to impose and collect taxes ("Tax Case").[10] The Tribal Government had enacted and imposed a gross receipts tax upon construction activities in connection with the building of a school at Venetie, Alaska.

In the Tax Case, Judge Kleinfeld granted a preliminary injunction preventing assessment and collection of the gross receipts tax. Here also, there was an appeal, in this instance by the Native Village of Venetie, *et al.*.[11] The Ninth Circuit Court rejected Venetie's contention that its reorganization under the Indian Reorganization Act

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[10] Clerk's Docket No. 1, case F87-0051 CV.

[11] An Amended Complaint subsequent to the appeal substituted the Tribal Government as lead defendant in place of Venetie and its council in recognition of the fact that the tax in question was the act of the Tribal Government, not the Venetie Council. Clerk's Docket No. 100, case F87-0051 CV.

("IRA") was conclusive evidence of Venetie's tribal status. *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1387 (9th Cir. 1988) (hereinafter "*Venetie I*"). The court then observed, significantly in terms of future developments in the case, that:

> If the IRA does not settle the matter, the inquiry would shift to whether Native Village or [sic] Venetie has been otherwise recognized as a tribe by the federal government. Failing there, tribal status may still be based on conclusions drawn from careful scrutiny of various historical factors.

Id. at 1387 (citations omitted). After discussing other pertinent issues, the Ninth Circuit Court affirmed the grant of a preliminary injunction in the Tax Case.

With both cases returned to the district court, an order of consolidation [12] for trial of the "tribal status issues" [13]

[12] Clerk's Docket No. 65, case F86-0075 CV. The order consolidating the Adoption Case and the Tax Case provided that trial on the tribal status questions with respect to the Native Village of Fort Yukon would be taken up at a later date, after resolution of the tribal status issues with respect to Venetie.

[13] It is clear from a Joint Statement of Issues filed October 1, 1993, Clerk's Docket No. 95, case F86-0075 CV, that all of the parties understood that the court would try both the issue of tribal status and the Indian country issue. The Joint Statement of Issues also provided that the court was to try the issue of whether the Venetie Council exercised child custody authority over tribal members. Joint Statement of Issues at 2, ¶ 5.

The Joint Statement of Issues also, in substance, provided that certain issues will not be decided as a consequence of the now-concluded trial. The court does not here decide whether the Venetie Council or the Tribal Government have been divested of any sovereign powers by federal law or necessary implication of dependent status. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980). The court also does not here decide whether the Venetie Council or Tribal Government must prove the extent of its powers over non-members in this court nor (what is the converse of the foregoing) whether the State of Alaska must exhaust tribal court remedies prior to any challenge of tribal powers in this court.

was, in due course, entered. Trial was commenced on November 1, 1993, and concluded on November 5, 1993. By agreement of the parties, written briefs were filed in lieu of closing arguments.

II. Tribal Status

The question to be resolved is whether the present residents of Arctic Village and Venetie and environs are a sovereign Indian tribe.[14] In accordance with well-established law, the Ninth Circuit Court held in *Native Village of Tyonek v. Puckett*, 957 F.2d 631 (9th Cir. 1992), that an Indian community constitutes a sovereign tribe if it can show that (1) it is acknowledged [15] as such by the federal government, or (2) it satisfies the traditional common-law definition of a tribe. *Id.* at 635. That definition, quoted by the Ninth Circuit Court from *Montoya v. United States*, 180 U.S. 261, 266 (1901), is as follows:

[14] In this decision, the court uses the term "sovereign tribe" to refer to native groups which are entitled to a government-to-government relationship with the United States. (Such tribes are sometimes referred to in Indian law literature as historic tribes.) In so doing, the court intends to distinguish historic or sovereign tribes from those native entities which are designated by statute as tribes for purposes of the benefits provided by Congress. *See, e.g.*, the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(e).

[15] Older literature and cases on the question of tribal status speak of a tribe being "recognized" by the federal government. In adopting federal regulations (25 C.F.R. § 83) with respect to tribal status, the Department of Interior employs the terms "recognized" and "acknowledged" interchangeably. William W. Quinn, *Federal Acknowledgement of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83*, 17 Am. Indian L. Rev. 37 n.4 (1992) (hereinafter "*Authority, Judicial Interposition*"), suggests use of the term "acknowledge" or "acknowledgment" since, in his view, "these terms more accurately reflect the ethnohistorical reality of the United States' acknowledging the existence of an extant and continuously surviving American Indian polity." The court here does likewise with the caveat that it views the terms as being substantially interchangeable in terms of legal effect.

> [A] body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory. . . .

Additionally, in *Tyonek* as well as the earlier Ninth Circuit Court decision in this case, the modern definition of sovereign tribal status also requires proof that:

> [T]hey are "the modern-day successors" to historical sovereign entity that exercised at least the minimal functions of a governing body. *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 559 (9th Cir. 1991).

Tyonek, 957 F.2d at 635.

The proof at trial was directed to the factual inquiry required by the common law, *Montoya*, test for tribal status. However, the Venetie Council and the Tribal Government contend in their opening post-trial brief that recent action by the Bureau of Indian Affairs ("BIA") removes all doubt that they have been acknowledged by the federal government as a sovereign tribe. Both theories were designated as issues for trial [16] and both approaches will be addressed in this order.

A. Federal Acknowledgement

Like virtually all aspects of Indian law, federal acknowledgement of Indian tribes has had a tangled history.

Until the late nineteenth century, tribal acknowledgement was primarily made on an ad hoc basis through individual treaties. William W. Quinn, *Federal Acknowledgement of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal History 331, 333-47 (1990) (hereinafter "*Historical Development*"). From 1778 through 1871, the United States entered into 372 treaties with Indian tribes. *Id.* at 339. The definition of acknowledged Indian tribes prior to

[16] Clerk's Docket No. 95 at 2, ¶ 1, at 4, ¶ 1, case F86-0075 CV.

1871 was essentially those with treaties. *Id.* at 347. From early in American history, the Supreme Court deferred the issue of whether the tribe in question was federally acknowledged to the "political departments of the government," i.e., the Executive Branch and Congress, stating that "[i]f by them those Indians are recognized as a tribe, this court must do the same." *U.S. v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865).

Congress ended the treaty-making era in 1871, 25 U.S.C. § 71. Thereafter, the BIA and Congress were confronted with the problem of how to classify and deal with numerous Indian tribes in the western states with no treaty relations between them and the United States. Some new criterion would have to be adopted to determine which tribes would be provided services. *Historical Development* at 347. In 1916, the BIA received its first formal request of this century for federal acknowledgement, but it was clear at that time that the BIA had no policy as to which tribes were federally acknowledged and which were not.[17] *Id.* at 354.

[17] For many years after 1871, Congress' practice was to include, in statutes aimed at Indians, definitions of "tribe" for purposes of each statute. Congress' practice has been to delegate the responsibility for determining the beneficiaries of the legislation to the Department of Interior. L.R. Weatherhead, *What is an "Indian Tribe?"—The Question of Tribal Existence*, 8 Am. Indian L. Rev. 1, 2-15 (1980). Consequently, Congress generally uses substantially the same definition of tribe in each act.

With minor variations, the boilerplate definition typically used was:

> "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

See the Indian Self-Determination Act, 25 U.S.C. § 450b(e); the Indian Civil Rights Act, 25 U.S.C. § 1301(1); the Indian Economic Development Act, 25 U.S.C. § 1452(c); the Indian Health Care Act, 25 U.S.C. § 1603(d); the Tribal Community Colleges Act, 25 U.S.C. § 1801(2); and the Indian Child Welfare Act, 25 U.S.C. § 1903(8).

The Indian Reorganization Act of 1934 used the term "recognition" for the first time in a jurisdictional sense. Only Indian tribes that were acknowledged would be provided with services and dealt with in trust relationships. A list of 258 tribes was made of all those eligible to participate in voting to reorganize under the Act. *Id.* at 356. Aware that there were many Alaska Native groups that had not previously been acknowledged, but that might be eligible to reorganize under the Act, the BIA promoted the enactment of the Alaska Reorganization Act of 1936. This Act established some criteria for the purposes of determining which Alaska Native groups were eligible to reorganize.[18]

Throughout the 1930s and 1940s, many Indian entities petitioned the Department of Interior for recognition. The BIA and the Solicitor of the Department of Interior issued a stream of opinions acknowledging, or declining acknowledgement of, these purported tribal entities. *Historical Development* at 358-9. Following two circuit court cases that conditioned important tribal rights on federal acknowledgement, *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); and *Joint Tribal Council of the Passamaguoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), the number of petitions for federal acknowledgement on file at the BIA multiplied exponentially. Overwhelmed by the flood of petitions and faced with a court order to decide a petition by the Stilliguamish tribe within 30 days, the Department of Interior decided that it had to formalize the petition and acknowledgement process.

In 1978, the Department of Interior promulgated the Federal Acknowledgement Procedures ("FAP"), which

[18] Such criteria were "having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district . . . ." Act of May 1, 1936, ch. 254, 49 Stat. 1250 (1936).

The reader will please bear in mind that *reorganization* of Alaska Native groups and *recognition* or acknowledgement of them are two different concepts.

now govern the acknowledgement of Indian tribes. 43 Fed. Reg. 39,361 (Sept 5, 1978); 25 C.F.R. §§ 83.1-83.11 (1978). A list of acknowledged tribes was to be published annually in the Federal Register pursuant to 25 C.F.R. § 83.6(b).[19] The initial publication of the list of acknowledged tribes stated that the, "list of eligible Alaska Native entities will be published at a later date." 44 Fed. Reg. 7235 (Feb. 9, 1979). As this court has previously had occasion to observe, the subsequent lists of Alaska Native entities and the accompanying preambles were less than clear in terms of their intended effect. *Alyeska Pipeline Co. v. Kluti Kaah Native Village of Copper Ctr.*, No. A87-201 CV, Order on Motion to Dismiss and Motion for Summary Judgment, July 27, 1993, Clerk's Docket No. 180 at 24-25.

On October 21, 1993 (only two weeks before the trial in this case), the Department of Interior, through BIA, published a Notice that purported to clarify the past confusion as to Alaska Native entities. The Notice consisted of a lengthy preamble which chronicles the confusing history of the Department's use of tribal acknowledgement proceedings and the Department's publication of lists of tribes which it may or may not have acknowledged. 58 Fed. Reg. 54,364-66 (Oct. 21, 1993). It purports to contain an updated list of Alaska Native entities including the Village of Venetie, the Village of Arctic Village, and the Native Village of Venetie Tribal Government.[20] The

[19] Unless otherwise indicated, the court refers in this decision to the 1978 regulations as currently published in the Code of Federal Regulations. 25 C.F.R. Part 83 has been revised and amended 59 Fed. Reg. 9293 (Feb. 25, 1994). The new regulations require that the list be published at least every three years. 59 Fed. Reg. 9294, § 83.5(a).

[20] The Native Village of Venetie Tribal Government did not appear on any of the previous lists. The three current listings are cross-referenced as follows:

Arctic Village (See Native Village of Venetie Tribal Government)

many non-tribal, corporate, entities included in the 1988 list were deleted. In the preamble, the BIA asserts that:

> This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged tribes; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes; and are subject to the same limitations imposed by law on other tribes.

58 Fed. Reg. 54,366 (Oct. 21, 1993).

In their opening brief, the Venetie Council and Tribal Government contended that, with publication of the Notice of October, 1993, the people of Venetie and Arctic Village were acknowledged as a tribe.[21] They contended that acknowledgement, once effected, is a political decision subject to review only for arbitrariness. They pointed out that Congress or the Executive Branch may not acknowledge as a tribe a group of people who are not a "distinctly Indian community" citing *United States v. Sandoval*, 231 U.S. 28, 46 (1913). The Venetie Coun-

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Village of Venetie (See Native Village of Venetie Tribal Government)

Native Village of Venetie Tribal Government (Arctic Village and Village of Venetie)

58 Fed. Reg. 54,368-9. It is unclear whether the Notice was intended to publicize the acknowledgement of one, two or three tribes.

[21] Venetie Council opening brief at 16-19, Clerk's Docket No. 126, case F86-0075 CV.

cil and Tribal Government argued that their tribal status was a political question subject only to review for arbitrariness. As discussed below, this argument begs the question of whether acknowledgement of a tribe has occurred for purposes of this case.

The State of Alaska argued that the Executive Branch had not recognized the Tribal Government, or any other entity in the Chandalar region, as a tribe prior to commencement of this litigation.[22] The State disputed the effect of the Notice of October, 1993. While conceding that the Secretary has general authority to interpret tribal eligibility statutes, the State contended that such authority did not extend to recognizing tribes.[23] Finally, based upon its review of extensive evidence presented at trial with respect to dealings between the BIA, on the one hand, and principally the Venetie Council and residents of Arctic Village on the other hand, the State argued that there has been no executive "recognition of the Tribal Government as a tribe."[24]

At the risk of seeming to digress, the court notes that the Notice first came to the attention of the court and the

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[22] State of Alaska opening brief at 7-19, Clerk's Docket No. 129, case F86-0075 CV.

[23] The State argued, with reference to the FAP regulations, 25 C.F.R. Part 83, that the BIA has violated its own regulations which are asserted to be "limited to dealing with tribes in the 'continental 48 states' ". State of Alaska opening brief at 9, Clerk's Docket No. 129. This argument need not long delay us; for the State misquotes the regulation. It does not apply in the "continental 48 states"; rather, section 83.6(a) makes the FAP procedures applicable "in the continental United States". Alaska is patently a part of the North American continent. In revising the FAP regulations, the Secretary has added a definition of "continental United States", which "means the contiguous forty-eight states and Alaska." 59 Fed. Reg. 9293, § 83.1 (Feb. 25, 1994).

[24] State of Alaska opening brief at 19, Clerk's Docket No. 129, case F86-0075 CV.

parties in a related case[25] raising the same issues as the court has here. In that case, defendant Kluti Kaah Native Village of Copper Center moved for partial summary judgment and dismissal in its favor as to the issue of tribal status. The foundation for this motion was the Notice which listed the Kluti Kaah Native Village of Copper Center as one of the purportedly acknowledged Alaska Native entities. This motion was expressly not opposed by either plaintiffs or the intervenor, State of Alaska. The State, in substance, conceded that the Kluti Kaah were a tribe. The court granted the motion and dismissed Kluti Kaah Native Village of Copper Center from the case.[26] The State of Alaska now takes the position in these proceedings that the Notice did *not* effect acknowledgement of the tribal status of the people of Venetie, Arctic Village or their Tribal Government.

The court's concern over the inconsistency of positions taken by the State with respect to the effect of the Notice was overshadowed by the court's more immediate concern that the Venetie Council and Tribal Government appeared to write-off too quickly the State's contention in this case that the Secretary had no authority to administratively acknowledge tribal status. This argument, if adopted by the court, would undercut not only the Tribal Government's argument that acknowledgement was effected by the Notice but, as well, the entire FAP process. Subsidiary to this, the court was concerned that the Notice was apparently issued in favor of a host of Alaska Native entities, none of which had made application for acknowledgement under the process created in 1978 and published in 25 C.F.R. § 83. The FAP regulations seemed to the court to provide for the publication of a list of

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[25] Alyeska Pipeline Service Co., *et al.*, plaintiff, State of Alaska, intervenor-plaintiff v. Kluti Kaah Native Village of Copper Center, *et al.*, defendants, case A87-0201 CV.

[26] Clerk's Docket No. 203, case A87-0201 CV.

native groups who had gone through the FAP process. 25 C.F.R. 83.6(a) and (b). These concerns were related to the parties in an order filed May 5, 1994, requesting supplemental briefing.[27]

In responding to the question of the Secretary's authority to acknowledge tribes in Alaska, the Venetie Council and Tribal Government discuss the development of the various lists of Alaska Native groups promulgated by the BIA, citing as authority for their issuance 25 C.F.R. § 83.6(b). In so doing, they emphasize that the lists relate to "*previously* recognized tribes". Native Village of Venetie supplemental brief at 11, Clerk's Docket No. 135. They recite from the preamble to the Notice the BIA's current statement of purpose in issuing a list is:

> [T]o publish an Alaska list of entities conforming to the intent of 25 C.F.R. 83.6(b). 58 Fed. Reg. 54,365 (Oct. 21, 1993).

Venetie then states:

> Thus, the Department finally followed its own mandate to publish a comprehensive list of *previously* acknowledged tribes—a mandate that had been only partially fulfilled since 1978.

Native Village of Venetie supplemental brief at 11, Clerk's Docket No. 135 (emphasis supplied). The court was initially unsure that the foregoing words meant what they seemed to say: i.e., that the Venetie Council and Tribal Government had "previously" been acknowledged. The court's uncertainty was removed by the future statement that:

> In his application of § 83.6(b), the Secretary has finally determined which tribal entities qualify as acknowledged tribes and thus are entitled to full recognition. Recognized *tribal status was not conferred on these entities for the first time in October 1993.*

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[27] Clerk's Docket No. 134.

> Rather, these entiites have been placed on the list because the BIA determined that they had been "previously recognized and were receiving services". 25 C.F.R. § 83.6(b) (1993). Therefore, the court's inquiry is limited to determining whether the placement of a particular tribe on the list was arbitrary. *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

Id. at 12 (emphasis supplied).

Plainly, the Venetie Council and Tribal Government have shifted their position in response to the court's order for supplemental briefing. They concede that the October 21, 1993, Notice and list did not effect acknowledgement of tribal status. The Venetie Council and Tribal Government now contend that they were previously acknowledged but do not specify how, when, or by what branch or agency of the government acknoweldgement was achieved.

For its part on supplemental briefing, the State reiterates its contention that the Secretary has no statutory or other authority to recognize tribes as sovereign entities.[28] Alternatively, the State contends that the Secretary has promulgated a federal acknowledgement procedure, which neither the Venetie Council nor the Tribal Government pursued. On the authority of *United States v. Nixon*, 418 U.S. 683, 694-96 (1974), the State argues that, having adopted regulations to govern a process, the Department of Interior must follow them.[29]

1. *Did the Notice effect acknowledgement?*

Based upon the initial round of post-trial briefing in this case, it was the court's supposition that a principal issue to be decided was: did the Department of Interior Notice

[28] State of Alaska supplemental brief at 1, Clerk's Docket No. 138, case F86-0075 CV.

[29] State of Alaska supplemental brief at 16, Clerk's Docket No. 138, case F86-0075 CV.

of October 21, 1993, listing Venetie, Arctic Village and the Tribal Government as tribes effect acknowledgement? As a consequence of the supplemental briefing, the issue is moot; for the Venetie Council and Tribal Government do not now make this contention. Accordingly, the court now expresses no opinion as to whether inclusion of a native entity in the Notice could effect acknowledgement of a tribe not otherwise acknowledged by Congress or the Executive Branch.

Nevertheless, the court has a case to decide and is confronted with the fact that Venetie and Arctic Village as well as the Tribal Government are named in the public Notice as acknowledged tribes. For purposes of further discussion of the tribal status issue in this case, the court will proceed with the Venetie Council and Tribal Government's supplemental argument to the effect that they were acknowledged previous to publication of the Notice.

2. *Does the Department of Interior have the power to acknowledge tribal status?*

In 1978, the Department of Interior promulgated its FAP regulations which now govern the acknowledgement of Indian tribes. 25 C.F.R. § 83.1-83.11. These regulations are a clear assertion of executive authority over the acknowledgement process. The State of Alaska contends that there is no statutory or other authority for this assertion of power.

Three statutes were cited in 1978 by the Secretary as authority for adopting the FAP regulations (25 C.F.R. Part 83). They do not expressly grant the authority claimed by the Secretary.[30]

The first statute, 5 U.S.C. § 301,[31] grants power to the head of each executive department to prescribe general

[30] *See Authority, Judicial Interposition* at 47-8.

[31] 5 U.S.C. § 301 reads in part:

> The head of an Executive department . . . may prescribe regulations for the government of his department, the conduct

housekeeping and procedural rules to manage that department. The other two statutes are 25 U.S.C. §§ 2 and 9.[32] Section 2[33], a grant of managerial authority from the Secretary of the Interior to the Commissioner of Indian Affairs (now designated as the Assistant Secretary of the Interior—Indian Affairs), is scant authority for the Secretary to establish a perpetual government-to-government relationship between an Indian entity and the federal government. Section 9[34] delegates legislative authority to the President, but limits his rulemaking authority to effecting the provisions of existing congressional acts. None of these statutes explicitly grant the Secretary the authority that he would exercise under the FAP regulations.

Nevertheless, the Supreme Court has held that congresional acquiescence to administrative practices can fix the construction of federal law. In *United States v. Midwest Oil*, 236 U.S. 459, 472-73 (1915), the court was

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of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.

[32] 25 U.S.C. § 2 (1988) is a recodification of section 463 of the *Revised Statutes*, derived from the Act of July 9, 1832, ch. 174, § 1, 4 Stat. 564, and the Act of July 27, 1868, ch. 259, § 1, 15 Stat. 228. 25 U.S.C. § 9 is a recodification of section 465 of the *Revised Statutes* and derived from the Act of July 30, 1834, ch. 162, § 17, 4 Stat. 738.

[33] 25 U.S.C. § 2 reads:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

[34] 25 U.S.C. § 9 reads:

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

required to determine the existence of the President's authority to withdraw lands that had been declared open and available for disposition to private citizens. The court noted that the President "has, during the past eighty years, without express statutory,—but under the claim of power so to do,—made a multitude of Executive Orders which operated to withdraw public land that would otherwise have been open to private acquisition." *Id.* at 469. This history supported the conclusion that:

> Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystalize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself, —even when the validity of the practice itself is the subject of investigation.

Id. at 472-73.

Notwithstanding any confusion over the meaning of the various lists of Alaska Native entities, it is clear that the Department of Interior has, from the beginning of the acknowledgement program in 1978, claimed to have the power to recognize Alaska Native entities for all purposes, including sovereignty. Section 83.11 of the FAP regulations reads as follows:

> Upon final determination that the petitioner is an Indian tribe, the tribe shall be eligible for services and benefits from the Federal Government available to other federally recognized tribes and entitled to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes with a government-to-government relationship to the United States as well as having the

> responsibilities and obligations of such tribes. Acknowledgement shall subject such Indian tribes to the same authority of Congress and the United States to which other federally acknowledged tribes are subject.

A plainer statement of intent could hardly be made. The Department of Interior's assumption of authority was as broad in 1978 as it is today, and includes the power to recognize Alaska Native and Indian entities as sovereign tribes. Congress has had a decade and a half in which to challenge this exercise of power. Prior to publication of the October 21, 1993, Notice, Congress had taken no action in response to the acknowledgement of over three hundred tribes by the Secretary in the last sixteen years.

Subsequent to the Notice, Congress did take some action; and it had to do with the very Notice upon which the court focuses. On November 24, 1993, Congress passed the Tlingit and Haida Status Clarification Act, Pub. L. No. 103-454, 108 Stat. 4791 (Nov. 2, 1994). In this Act, Congress expressly found that the Central Council of Tlingit and Haida Indian Tribes of Alaska were a federally recognized Indian tribe. Stripped of a lot of technicalities and qualifications, this Act, in substance, chastises the Secretary for not including the Central Council of Tlingit and Haida Indian Tribes of Alaska in the Notice. Even more to the point which the court would now make, Congress found in this Act that:

> The Secretary does not have the authority to terminate the federally recognized status of an Indian tribe as determined by Congress . . . .

Section 2, Pub. L. No. 103-454, 108 Stat. 4791 (Nov. 2, 1994). It seems highly improbable that Congress would thusly rebuke the Secretary pointing out his lack of authority with respect to terminating congressionally recognized tribes without also taking the Secretary to task for *acknowledging* tribal status if it were the view of Congress that he did not have that power.

More generally, as discussed above, the Department of Interior and, by delegation, the BIA have been processing petitions for the acknowledgement of tribes since before the turn of the century. When the Secretary promulgated the FAP regulations in 1978, he merely formalized a process exercising a power that he had been employing for decades. Congress' long acquiescence in this process indicates its recognition of the Secretary's continuing power to acknowledge tribes.

Accordingly, the court concludes that the Secretary and, by delegation, the BIA had authority to adopt the FAP regulations and have authority thereunder to acknowledge tribal status.

3. *Is the status of Venetie Council and/or the Tribal Government a political question?*

Although the Venetie Council and Tribal Government have abandoned any contention that the October 21, 1993, Notice effected their acknowledgement as a tribe, it is not clear that these parties have abandoned the contention that their status is a political question. As they have pointed out, it has long been the rule that if the political branches of the government have recognized an Indian entity as a tribe, the court must do the same. *Sandoval*, 231 U.S. at 47. However, acknowledgement decisions by the political branches are reviewable for arbitrariness. Congress, for example, cannot recognize as an Indian tribe a group of people who are not a distinctively Indian community. *Id.* at 46.

No-one in this case has contended, and there is no evidence in this case, that Congress has ever acknowledged the tribal status of the Venetie Council, Arctic Village, or the Tribal Government.

Venetie Council and the Tribal Government claim to have been acknowledged. They do not say how, nor when, nor by what agency acknowledgement was effected. The State disputes the claim of acknowledgement.

If the evidence before this court demonstrated that Congress or the Department of Interior had made a decision to acknowledge the Venetie Council or the Tribal Government, that decision would arguably be a political one, subject only to review for arbitrariness.[35] As it is, however, the Venetie Council and the Tribal Government have abandoned any claim that publication of the Notice effected acknowledgement. There is no FAP decision before the court. The parties disagree over whether the evidence produced at trial demonstrates entitlement to acknowledgement.

The court concludes that it is not confronted with a political question.

4. *Did the BIA or any other Executive agency acknowledge the Venetie Council or Tribal Government as a tribe?*

The Venetie Council was authorized and organized under the Indian Reorganization Act ("IRA"). 25 U.S.C. § 473a.[36] Venetie acquired IRA status in 1940 (Exhibit 22). As recounted by the State of Alaska at some length in its opening brief,[37] there has been significant interchange—much correspondence—between the Venetie

[35] For another view of this point, see Felix S. Cohen, *Handbook of Federal Indian Law* ch. 1, § B1 at 3 (1982).

[36] Sections 461, 465, 467, 468, 475, 477, and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska: *Provided*, That groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title.

25 U.S.C. § 473a.

[37] State of Alaska opening post-trial brief at 10-17, Clerk's Docket No. 129.

Council as well as others, on the one hand, and the BIA, on the other hand, over the years. Neither the testimony nor the exhibits produced by any of the parties evidences a decision by the BIA to constitute Venetie or any other entity associated with it as a sovereign tribe. IRA status alone, while evidence of a village's political cohesiveness, a factor in proving common-law tribal status, is not dispositive. *Native Village of Tyonek v. Puckett*, 957 F.2d at 635.[38]

The court finds no evidence that the BIA or any other Executive Branch has ever engaged in any adjudicative process aimed at establishing the tribal status of the people of Venetie or Arctic Village. There is no evidence that the Venetie Council, Arctic Village, or the Tribal Government ever petitioned the BIA for acknowledgement under the FAP regulations. 25 C.F.R. § 83.7. The court notes in passing that this procedure for acknowledgement was in place for fifteen years prior to trial.

On January 12, 1993, the Solicitor for the Department of Interior released his legal opinion on the powers of Alaska Native villages. Governmental Jurisdiction of Alaska Native Villages over Land and Nonmembers, M-36975 (Jan. 12, 1993). In that opinion, the Solicitor discussed at great length the subject of Alaska village tribal status. *Id.* at 8, *et seq.*. In summing up the subject of the "Treatment of Native Villages by Congress", *Id.* at 46, the Solicitor observes:

> In the summer of 1990, Congress enacted legislation directing the establishment of the "Joint Federal-State Commission on Policies and Programs Affecting Alaska Natives." Act of August 18, 1990, Pub. L. No. 101-379, § 12, 104 Stat. 473, 478-83. That

[38] In *Venetie I*, 856 F.2d 1384, 1387 (1988), the Ninth Circuit Court suggested that the Alaska amendment to the original Indian Reorganization Act (25 U.S.C. § 473a), "raises doubt as to whether IRA organization should be construed [as conclusive evidence of tribal status] in the case of Alaska natives."

> Commission has a broad mandate to review public policies affecting Alaska Natives. When the Commission completes its work and files its recommendations, Congress may revisit how it deals with Alaska Native villages. For now, we cannot say that Alaska Native villages are not tribes for purposes of federal law. *We do not mean to conclude that every Native village is an Indian tribe.*[126] *Which specific Alaska Native villages are tribes is a factual determination beyond the scope of this opinion.*

Id. at 48 (emphasis supplied).[39] The court's point is this: in January of 1993, the Solicitor for the Department of Interior viewed the matter of tribal status for individual Alaska Native villages as an open question. He observed, as had the Ninth Circuit Court [40] that village tribal status depends upon the facts of each case. Ten months later, the Venetie Council and Tribal Government claim to have already been acknowledged as sovereign tribes. If the people of Venetie and Arctic Village were ever acknowledged as a tribe by the BIA, the Solicitor seems not to know of it.

The Venetie Council and Tribal Government have failed to convince the court that their tribal status has been acknowledged by the federal government. The court concludes that neither of these groups nor Arctic Village is a federally acknowledged tribe. The court turns now to the alternative common law or the *Montoya* test for establishment of sovereign tribal status.

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[39] Footnote 126 is an acknowledgment of the Ninth Circuit Court's decision in *Native Village of Venetie I.R.A. Council v. State of Alaska*, here referred to as the Adoption Case. The Solicitor observes that the Ninth Circuit Court has held that Alaska Native groups are not necessarily tribes with inherent sovereign powers over such matters as child custody.

[40] *Venetie I*, 856 F.2d at 1391.

B. Alternative Common-Law Test

The court has heretofore [41] set out the accepted common-law definition of an Indian tribe as first articulated in *Montoya v. United States*, 180 U.S. at 266. Under *Montoya*, a native group has proved sovereign tribal status if it establishes by a preponderance of the evidence that:

> (1) it is a group of Indians of the same or similar race;
>
> (2) the group is united in a community;
>
> (3) the group is under one leadership or government; and
>
> (4) the group inhabits an area of some reasonable definition.

As also set out above,[42] under *Native Village of Tyonek v. Puckett*, 957 F.2d at 635, a native group must also establish by a preponderance of the evidence that it is the present-day successor to the historic sovereign entity which, under *Montoya* factor 3, exercised at least minimal government functions.

The court now examines in turn the foregoing factors which plaintiffs must prove in order to establish sovereign tribal status.

1. The Neets'aii Gwich'in are a Group of Indians.

The anthropological evidence at trial established that the Neets'aii Gwich'in [43] have been consistently identified as a separate and distinct group of American Indians.

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[41] *See supra* pp. 11-12.

[42] *See supra* pp. 11-12.

[43] The preferred modern spelling appears to be *Neets'aii Gwich'in*. Early works referring to the group use the spelling *Natsai Kutchin*. The name has been translated to mean "those who live off the Flats" (i.e., the Yukon River). Other variants of Neets'aii are *Natsit*, *Natche*, and *Natsik*.

The Neets'aii were identified as a separate group of Indians at the time of the first historical contact with Hudson Bay Traders. The earliest journalist to describe them was Alexander Hunter Murray, a Hudson Bay Company clerk. Murray refers to the inhabitants of the Chandalar River basin as the Nyetse-kutchin and also as the "Gens du large" [44] or northern Indians. Alexander Murray, *Journal of the Yukon 1847-1848* 10-11 (1910), cited in Exhibit 171 at 2.

Two professional anthropologists, Cornelius Osgood and Robert McKennan, separately visited the area in the early 1930s, each initially unaware of the other's work. Osgood published an ethnographic study on the Gwich'in in the late 1930s,[45] and Robert A. McKennan's work, *Anent the Kutchin Tribes*, was published in *American Anthropologist* in 1965 (Exhibit 176). The court finds the McKennan work to be the most authoritative source available on the Gwich'in people. Both Osgood and McKennan described the Neets'aii as one of eight or nine Gwich'in tribes. The Neets'aii inhabited a territory centered on the East Fork of the Chandalar River. Subsequent scholars have confirmed the continuing existence of the Neets'aii as a separate and distinct group of American Indians. 6 Richard Slobodin, *Kutchin, Handbook of North American Indians* 514-15 (Smithsonian 1981) (Exhibit 179—identified but not admitted); Dr. Joan Ryan, *Report on the Gwich'in* 3-5 (1990) (Exhibit 178).

One of the plaintiffs' experts, Dr. Jack Campisi, studied the family genealogies of the Venetie and Arctic

[44] The name *Gens du Large* was apparently created by Hudson's Bay Company voyagers, referring to the group's nomadic movements over great distances, and was eventually corrupted to Chandalar. This latter term "came to be applied to both the natives and the principal river that flows through their territory." Robert A. McKennan, *The Chandalar Kutchin* at 14 (1965) (Exhibit 176).

[45] Cornelius Osgood, *Kutchin Tribal Distribution and Synonymy*, American Anthropologist 36(2) (1934) (Exhibit 177—identified but not admitted).

Village residents and found that the ninety-nine households in the two villages were descended from thirteen families. He found that the villages are closely linked in ancestry, with several elders having descendants in both communities. Dr. Jack Campisi, *Final Report on the Neets'aii Gwich'in: Tribe of Indians of Alaska* (Exhibit 171 at 10-11). Of the roughly 200 people in Venetie, only about ten are non-native, all of whom are school teachers. Narrative testimony of Eddie Frank, ¶ 9, Clerk's Docket No. 96. Approximately the same proportion exists in Arctic Village.

On the basis of this evidence, the court finds that the people of Venetie, Arctic Village, and environs are a group of American Indians of the same or similar race.[46]

2. *The Group Inhabits a Particular Area*

The Gwich'in people have historically occupied a sizeable territory ranging from the upper reaches of the Koyukuk River in the west and to the MacKenzie River, Canada in the east, north to the crest of the Brooks range and south to roughly the 65th parallel. Dr. Joan Ryan, *Report on the Gwich'in* at 3 (Exhibit 178). The Gwich'in have been traditionally subdivided into eight or nine separate tribes, each occupying different territories.[47]

[46] The State approaches this issue from a different direction. It focuses on evidence that the residents of the two villages have intermarried over time with persons from other Gwich'in groups, and argues that this dilution negates any claim that they are of a different race from other natives in central Alaska.

The State's reasoning misses the point of the first prong of the *Montoya* test, which merely requires proof that the group consists of Indians that are of "a same or similar race." The *Montoya* test does not require such complete isolation from neighboring groups.

[47] Other Gwich'in groups include, from east to west, the Gwycha Gwich'in near the MacKenzie River, the Teetl'it Gwich'in in the drainage of the Peel River, the Takuth Gwich'in near the Upper Porcupine River, the Vanta Gwich'in who occupy the Porcupine River area, the Tranjik Gwich'in near the Black River, the Kutcha

The Neets'aii Gwich'in primarily occupy an area consisting of the drainage of the East Fork of the Chandalar River and the headwaters of the Sheenjek River, east to the vicinity of the Porcupine River, and from the summit of the Brooks Range in the north to the Yukon River in the south. *Id.* at 4. This is the area in which they have traditionally hunted and fished.[48]

In the late 1930s and early 1940s, the residents of Venetie and Arctic Village petitioned the federal government to set aside a large reservation,[49] and on March 1, 1944, the reservation was established. The 1.8 million acre Venetie Reservation (sometimes referred to as the Chandalar Reservation) is in the heart of the land traditionally used by the Neets'aii. (Exhibit 206).

The State contends that many of the Neets'aii have dispersed to other Alaskan communities outside the area described above. The *Montoya* test requires a showing that the group inhabits a "particular though sometimes ill-defined territory". *Montoya v. United States*, 180 U.S. at 266. For purposes of establishing tribal status, specific boundaries need not be drawn. As with marriage into the group by those from other native groups, some out-migration of members is not proof that a purported tribe does not occupy a particular area. The State has not effectively rebutted the plaintiffs' evidence that the Neets'aii have historically occupied the Chandalar River basin apart from other Indian entities in north-central Alaska.

The court finds that the Neets'aii Gwich'in have, since before the appearance of non-natives, inhabited a reason-

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Gwich'in in the Yukon Flats area, the Te'uth Gwich'in near Birch Creek, and the Dahai Gwich'in who resided to the west of the Neets'aii. Dr. Joan Ryan, *Report on Gwich'in* at 4-5.

[48] Plaintiffs' Exhibit 206 is a topographic map of the area.

[49] The official survey of the reservation showed it to be 1,408,000 acres, which was amended in 1971 to 1,799,927.65 acres. The latter figure is roughly the size of the state of Delaware.

ably well-defined territory to the virtual exclusion of other people; and in modern times have occupied much of that same territory, in the form of the Venetie Reservation. They still occupy this same land.

3. *Community and Leadership*

The two preceding sections of this opinion have dealt with *Montoya* factors one and four, which have a relatively straightforward presentation. The terms employed are relatively easy to understand; and the evidence presented at trial bore directly upon those factors. The second and third *Montoya* factors, a cohesive community and leadership or government, present more difficult concepts which require considerable flexibility and understanding with respect to changes within native groups over time and differences between native groups in different parts of the country.[50] This court sees the community and leadership or government factors to be very much interrelated. Leadership or government without community (and vice-versa) has little meaning. *Montoya* holds that without leaders (some governance), there can be no tribe.[51] Similarly, leadership without a community to lead is meaningless and ignores the realities of man's

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[50] [I]t is appropriate that the definition of "tribe" remain broad enough and flexible enough to continue to reflect the inevitable changes in the meaning and importance of tribal relations for the tribal members and the wide variations among tribal groups living in different parts of the country under different conditions. That the Mashpees have lost this case represents not a failure of the law to protect Indians in changing times, but a failure of the evidence to show that this group was an object of the protective laws.

Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 588 (1st Cir. 1979). The First Circuit concludes this discussion with the observation that, "unlike, for instance, explanations of 'reasonable doubt', no one explanation of the *Montoya* definition can adequately serve in all cases at all times." *Id.*

[51] *Montoya v. United States*, 180 U.S. at 266.

political nature. Additionally, the amount of government which must be established is to be determined in relationship to the "situation" of the group in question. *Mashpee*, 592 F.2d at 584. Plainly, the "situation" referred to must be the perceived needs of the community.

The court will, in following paragraphs, discuss the evidence produced at trial in this case with a view toward determining whether the Neets'aii Gwich'in had acknowledged leaders and whether or not those leaders caused the Neets'aii Gwich'in to order their lives in some significant way. *Id.* at 584. In doing so, the court will evaluate the nature and extent of leadership or governance as it related to things of importance in the life of the Gwich'in. *Id.*

The court will also examine the evidence with respect to how leadership passed and how government evolved for the Neets'aii Gwich'in. In performing this function, the court is mindful of the admonition of the Ninth Circuit Court in *Native Village of Venetie*, that changes in government or governance flowing from adaptation to the ways of non-natives does not destroy tribal status unless the plaintiffs have become fully assimilated into a non-native culture. *Native Village of Venetie* 944 F.2d at 557, citing *United States* v. *State of Washington*, 641 F.2d 1368, 1373 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

The plaintiffs must also establish that the Gwich'in were united in a community. *Mashpee*, 592 F.2d at 585-86. In the process, the court will examine the evidence with respect to whether the villages are a community

> defined by characteristics which are identifiable as Indian, not necessarily aboriginal Indian.
> . . .
> [A] distinct community [does not exist if the group has] just blended in with everybody else, in all respects or in all significant respects.

Id. at 586 (quoting the jury charge of the trial court judge).

Montoya and the briefs of the parties offer the court no authoritative insight into the concept of community as a factor in tribal existence. One might think, and the court in *Mashpee* suggests, that contacts between a native group and government officials would be relevant in establishing the "government" component of this discussion.[82] The court finds the Ninth Circuit Court's discussion of this point in *Tyonek* to be more insightful. In *Tyonek*, the court suggested that dealings with government officials, "is evidence of the Village's political cohesiveness." *Native Village of Tyonek v. Puckett*, 957 F.2d at 635. Individuals (perhaps in great numbers) can severally approach the government for all manner of assistance. They may or may not be acting in concert with one another. Those who contact the federal government may have a following in the community; or they may be acting alone, with no community support. Conversely, however, such contacts, when explored fully, may prove to be backed by wide support in the group, i.e. cohesiveness in the group, a united community.

More generally, the community factor in tribal existence must necessarily have some meaning beyond race or ethnicity and place of residence. Otherwise, there would be no need of separate inclusion of this factor. The Venetie Council and Tribal Government must demonstrate that their people are joined together as a unit through beliefs, way of life, or the like which go beyond just ethnicity and place of residence.

The data regarding pre-contact tribal government practices among the Gwich'in are relatively sparse. McKennan found that the tribal affairs of the Neets'aii were governed by chiefs who exercised considerable power over

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[82] The court in *Mashpee* considered a series of petitions to the government as demonstrative of continuity of leadership. *Mashpee* at 585.

members of the group. Chiefs were usually either successful hunters and trappers or strong and aggressive war leaders. Robert A. McKennan, *Anent the Kutchin* at 65-67 (Exhibit 176). Evidence of pre-contact tribal organization was documented by the BIA in its *Report of Investigation for Sheenjek Caribou Fences*. (Exhibit 170). The fences were designed to entrap caribou during spring and fall. The cooperation and effort of the men, women and children from many families was required to construct, use and maintain the fences. *Id.* at 16-19.

McKennan found the Neets'aii living in three separate but inter-related bands that coordinated their hunting and fishing efforts.[53] Familial and social bonds between the groups were strong, with relatively little contact with members of more distant neighboring villages. Many witnesses at trial described the close bonds that continue to exist even today between the Neets'aii families of Arctic Village and Venetie. *See* Narrative testimony of Moses Sam, ¶¶ 5, 6; Jessie Williams, ¶ 6; Robert Frank, ¶ 8; Gideon James, ¶ 11; Sarah James, ¶ 8; Eddie Frank, ¶ 9; Ernest Erick, ¶ 4; and Maggie Roberts, ¶ 2; Clerk's Docket No. 96.

Sustained contact between the Neets'aii and non-Alaska white newcomers to the area did not occur until the early years of this century. Rapidly accelerating contact caused the Neets'aii form of governance to evolve from a traditional system, based on chiefs with authority over particular areas, into a tribal council system. As federal involvement in the area increased, the tribal organization became increasingly westernized. Campisi at 19-20, 46-47 (Exhibit 171). Under the leadership of John Fredson,

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[53] The third band, those not associated with the Venetie and Arctic Village areas, was a group that based its activities in the now deserted village of Christian. The population of Christian Village has dwindled in recent years with most of its inhabitants assimilating into Venetie and Arctic Village.

a native school teacher from Venetie, the Neets'aii contacted the Department of Interior in 1938 asking for a reservation encompassing Venetie, Arctic Village, Christian, and the fish camp at Ka-Chick.[54] (Exhibit 6). A map and a typed petition listing sixty names accompanied the correspondence. The Secretary responded by giving Fredson information about how to petition for a reservation, (Exhibit 9), as well as an IRA constitution for Venetie that had already been approved. (Exhibits 14 and 20). The voters in Venetie ratified the IRA constitution in January, 1940, and the reorganized government at Venetie was called the "Native Village of Venetie". (Exhibits 20-23). At the same time, a formal Reservation Application was transmitted to Washington, D.C. (Exhibit 17). The application was accompanied by three separate petitions (one each from Venetie and Ka-Chick and one from Arctic and Christian Villages) all requesting that the same tract of land be set aside for their benefit. Fredson and the Venetie Chief, John Frank, traveled by dog sled in the depths of winter to obtain signatures from all of the members of each village. (Exhibits 17, 18). The reservation was approved and established in 1944.

In the late 1950s, Arctic Village began to transform from a seasonal settlement into a permanent community when it acquired a store and a school. (Exhibit 10; Exhibit 175, identified but not admitted). In 1957, the Arctic Village residents unsuccessfully petitioned to expand the reservation to include lands to the north and west of their village. (Exhibit 51). In December, 1962, the first Venetie-Arctic Village Common Council meeting was held in Arctic Village. (Exhibit 55). Local concerns in the two villages continued to be handled by village

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[54] Currently rendered Kahtsik, also known as Robert's Fish Camp. Narrative testimony of Ernest Erick, ¶ 4, Clerk's Docket No. 96.

councils, but when regional matters arose, they were resolved by the Common Council.[55] *Id.*

In the late 1960s, the impending passage of the Alaska Native Claims Settlement Act ("ANCSA"), in which Congress intended to terminate reservations in Alaska, caused the Neets'aii to act to preserve their land. They requested Congress to enlarge their reservation to include the additional acreage requested by Arctic Village in 1957, and they asked that the title to the enlarged reservation be given to the natives of Venetie and Arctic Village. (Exhibit 70). They also sought to be included, along with Tyonek, in a proposed amendment to the then pending settlement legislation that would allow them to choose whether the reservation would be terminated. (Exhibit 68).

ANCSA revoked all reservations in Alaska but one, the Annette Island Reserve in southeast Alaska. 43 U.S.C. § 1618(a). However, Venetie and Arctic Village were given the option of jointly selecting the former reservation lands in lieu of sharing in the monetary and regional corporation benefits of the Act. 43 U.S.C. § 1618(b). The members of the villages voted overwhelmingly to take title to their reservation lands rather than become shareholders in the regional corporation and receive benefits from the Alaska Native Fund.[56] (Exhibit 77, 78). The United States deeded the former reservation lands in fee

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[55] It is reasonably clear from the record as a whole that the Tribal Government was called the "Common Council" in the early days of its existence. Trial testimony of Jessie Williams, Tr. at 2-163.

[56] Although ANCSA gave villages having lands reserved and set aside for their use and benefit the option of taking title to those lands in preference to other ANCSA benefits, 43 U.S.C. § 1618(b), nevertheless, provided that the election was to be made by a "Village Corporation or Corporations". ANCSA obligated the villages to form corporate entities and act through them for purposes of acquiring title to reservation lands.

simple to the Venetie and Arctic Village ANCSA corporations as tenants in common. (Exhibit 109).

In 1976, the village members held a meeting to formalize representation of the two villages in the Native Village of Venetie Tribal Government. They provided for equal representation from each village on the Tribal Council. A chief is selected alternately from Venetie and Arctic Village for a three year term. This action was taken without BIA involvement and has received no BIA approval or recognition. In 1979, the Village members, acting through their ANCSA village corporations, conveyed the title of their former reservation to the Native Village of Venetie Tribal Government. (Exhibit 106). The village corporations ceased to function and were dissolved. (Exhibit 117).

The court finds that the Neets'aii Gwich'in were, from first recorded history down to at least the time of ANCSA in the 1970s, a semi-nomadic hunter/gatherer society. The Neets'aii Gwich'in's needs for governance were limited largely to effecting their survival, the taking of caribou in the fall and winter, and fish and other game in the summer. In this, they recognized and were led by skilled hunters who outsiders, and later the Gwich'in themselves, came to call chiefs. It was the need to survive, sometimes referred to as a subsistence way of life,[57] that was the focus of organization within the Neets'aii Gwich'in. The chiefs provided the leadership and governance needed for the Neets'aii Gwich'in to sustain themselves. This governance, albeit limited and uncomplicated, was what their "situation required". *Mashpee*, 592 F.2d at 584.

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[57] Many—perhaps a majority—of the people living in rural or "bush" Alaska consider themselves to live a subsistence lifestyle. Evidence of the pursuit of a subsistence lifestyle—that is, living off the land—does not establish a community or political cohesiveness for purposes of proving tribal status. A subsistence way of life is, however, one attribute of what may be established to be a distinctively native community.

Although little evidence of any formal process for the selection of leaders or chiefs is before the court, the court infers from the evidence that has been produced that there was, in fact, a continuity of chiefs who were selected by consensus for their skill in assisting the Neets'aii Gwich'in in meeting their need for sustenance. These leaders were not selected only in times of incursion by others or natural disaster. The need for sustenance was an every day, ever present concern.

The court finds that, well into historic times, the Neets'aii Gwich'in were united in a community led by their chiefs. It is a fact that the Neets'aii Gwich'in lived in as many as four separate locations at various times during recorded history; but Venetie was, at all times pertinent hereto, the central community and the others, such as Arctic Village (until relatively recent times), Christian, and Kahtsik were temporary or seasonal hunting and/or fishing camps. Direct ties with Venetie always existed. The subcommunities were clearly connected by family relationships since first recorded history.

More recently, in the late 1930s, the Gwich'in came together as a single community to form an IRA and petition for a reservation. It is true that by the 1950s, Arctic Village had become a permanent community and, ultimately, there came to be a village council in both that community and Venetie. This was a natural evolution as these communities grew and developed. The evidence is that they were still closely connected by family ties. Most recently, beginning in the 1960s, the Neets'aii Gwich'in again came together as a single community to form their tribal government. The formation of the Native Village of Venetie Tribal Government was not at all evidence of division within the community. Significantly, the Neets'aii Gwich'in have chosen to dissolve their corporate entities which the Settlement Act imposed in favor of their communal government, which now holds title to the former

Venetie Reservation. The corporate dissolutions were a group or community decision.[58]

The State of Alaska argues that because the Neets'aii Gwich'in do not live in one place (and they have indeed moved from place to place within what came to be the Venetie Reservation over time) they are not united in a community. The State takes much too narrow a view of community. As the court has observed at the outset, *community* is not about *place*. It is about relationships—cohesiveness amongst residents. The Neets'aii Gwich'in have actively participated in their governance, choosing leaders and reforming their governing bodies as needs changed, from before recorded history down to the present; and as a group have a long history of dealings with the federal government.

The State of Alaska also contends that the Tribal Government is a legal non-entity. From a non-native point of view, the Tribal Government no doubt so appears. The Tribal Government has not been shown to have been sanctioned by either of the political branches of the federal government and is not sanctioned by the State of Alaska as a municipality or as a domestic corporation. The absence of any such status is, however, quite irrelevant. Tribal status does not depend on the establishment of some particular form of leadership or government. The requirement is that there be an Indian community and that it have some form of leadership or government over all relevant periods of time. The Neets'aii Gwich'in meet this requirement.

Similarly, the failure of Venetie to effect changes in its IRA constitution to fold in Arctic Village does not

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[58] There is no evidence that any of these actions were contrived to support a claim of tribal status in this case. The decision to convey the former Venetie Reservations lands to the Tribal Government plainly had its origins in the decision which the Neets'aii Gwich'in made over twetny years ago against joining in ANCSA other than to take title to their historic lands.

negate tribal status. As already noted, changes in tribal organization attributable to adaptation do not destroy tribal status. *United States v. State of Washington*, 641 F.2d 1368, 1373 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). Similarly, the failure to expand the IRA organization or, what is more accurate, a regression to a form of governance different from anglo-American forms (IRA organization or corporation) does not negate tribal status. Rather than suggesting assimilation or the lack of a distinctive community or governance, the evolution of group organizations for Venetie and Arctic Village between the 1930s and the 1960s as described above is strong evidence of the persistence of a uniquely Indian community. To the extent that the IRA Council did not meet the people's needs, they looked elsewhere and formed, and have for over 30 years maintained, a tribal government. To the extent that congressionally imposed corporate entities did not meet their needs, the Neets'aii Gwich'in have caused the dissolution of those village corporations and the former reservation lands have been transferred to the tribal government such that the Neets'aii Gwich'in have held their lands in a communal state since 1979. The Neets'aii Gwich'in still live what is essentially a subsistence lifestyle and do so on their own land with leaders chosen by them and governance in their chosen form, much as they did when they were first observed by Osgood and McKennan in the 1930s and previously. Just as they recognized chiefs in the earliest history and councils more recently, the Neets'aii Gwich'in as a comunity now recognize the Tribal Government as the vehicle to provide community governance. Tribes evolve as do other political institutions; and the law of tribal status makes allowance for such change. *Mashpee*, 592 F.2d at 588.

Plaintiffs have established by a preponderance of the evidence that from earliest recorded history down to the present, the Neets'aii Gwich'in have been unified as a community. They have always lived apart from other

groups of people. They have continuously submitted to some form of governance. Their earliest acknowledged leaders or chiefs directed and assisted the Neets'aii Gwich'in in meeting their needs. In modern times, the Neets'aii Gwich'in have come together to form a government sanctioned entity (the IRA council) in order to gain control over and protect their land upon which they depend for subsistence. As reflected by the evolution from the IRA, through ANCSA corporations and on to the Tribal Council, the Neets'aii Gwich'in have, over time and on their own terms, repeatedly come together as a community to organize themselves and provide for the governance which suits their lifestyle. The court finds that the Neets'aii Gwich'in have requisite political cohesiveness.

The court finds that the Neets'aii Gwich'in are a distinctly native community. What distinguishes them from others is their combined attachment to the land, which they hold in communal fee, and the caribou, which they hunt upon that land. This affinity for the land and its product is not commercial or capitalistic in nature. The Neets'aii Gwich'in have not and do not appear about to blend in to or become assimilated by a non-native society, even though they enjoy some of the benefits of that larger society. The Neets'aii Gwich'in way of life is distinctly native.

4. Modern-day Relationship to Historical Entity

The final factor necessary to establish sovereign tribal status is that the native entity claiming tribal status must be the "modern-day successor to sovereign historical bands of natives". *Native Village of Venetie*, 944 F.2d at 559; *Tyonek*, 957 F.2d at 635. The "modern-day successor" concept discussed in the Adoption Case and *Tyonek* is an outgrowth of the Ninth Circuit Court's holdings in *United States v. State of Washington*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). In *State of*

Washington, the modern-day successor rule is that "the group must have maintained an organized tribal structure." *Id.* at 1372. Explaining the foregoing, the Ninth Circuit Court made the following further observations:

> [T]ribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community.
>
> The tribe need not have acquired organizational characteristics it did not possess when the treaties were signed. . . .
>
> Furthermore, changes in tribal policy and organization attributable to adaptation do not destroy tribal status.

Id. at 1372-73.

Applying the foregoing in *State of Washington*, the Ninth Circuit Court made note of the fact that the tribes in question have constitutions and formal governments which control the lives of their members. Similarly, the appellants failed to establish "the continuous informal cultural influence they concede is required." *State of Washington*, 641 F.2d at 1373. The appellants in *State of Washington* were of mixed blood due to intermarriages between Indians and non-Indians. They did not live in "distinctly Indian residential areas". The court took this as further evidence of a lack of tribal status. *State of Washington*, 641 F.2d at 1373-74. Concluding its discussion of continuity, and after observing that assimilation of Indians may be the result of federal or state discrimination, the Ninth Circuit Court held that continuity:

> [I]s required by the communal nature of tribal rights. To warrant special treatment, tribes must survive as distinct communities.

State of Washington, 641 F.2d at 1373.

The court finds that the Neets'aii Gwich'in who appear before the court through the Venetie Council and the

Tribal Government are the modern-day, institutional successors to the hunting leader/chiefs of first recorded history. Tribal government, especially in the early days, was limited; but no more government was needed and, therefore, no more was legally necessary for tribal status. Tribal status and its continuity may not be rejected because a native group fails to organize in some particular way that is useless to it. As already discussed at greater length, the Neets'aii Gwich'in shifted to a council form of government when the need arose to do so in order to gain control of lands from which they had traditionally subsisted. The Neets'aii Gwich'in rejected ANCSA rights in favor of maintaining control of those lands and abandoned even the ANCSA corporations, conveying their lands to the communal, tribal government, which they formed. There was no break in this sequence. The court finds that the village councils and, in particular, the Tribal Government are the modern-day successors to the historical hunting leader governance which characterized the Gwich'in at the earliest historical times.

Governmental continuity, however, is not sufficient to establish the present day Neets'aii Gwich'in as the modern-day successors to a historic entity. There must also be a continuous linkage between the institutional tribe and the communal group. *State of Washington*, 641 F.2d at 1373. As discussed at length in the immediately preceding section of this opinion, it is the Neets'aii Gwich'in people who have repeatedly come together to protect the land which the community now owns and to form the political institutions which have provided governance for them. The institutions are linked to the people and vice-versa. The Neets'aii Gwich'in who control the Tribal Government of today are the direct lineal descendants of the prehistorical groups and are a politically cohesive group which is distinctly native. The institutions have not taken on a life of their own. The Tribal Government is not isolated from the people nor has its focus become commercial.

The foregoing finding is bolstered by the paucity of evidence of assimilation and the scant evidence of tribal dispersement. Additionally, the present day Neets'aii Gwich'in are, by and large, the lineal descendants of the first known members of this tribe. Intermarriage with non-natives has been minimal. Significantly, the modern-day tribal members live much as they did at earliest historical times despite the use of a great many modern conveniences. The Neets'aii Gwich'in occupy and dominate their historic lands which are now held in communal fee. There are no non-native communities. By and large, the Neets'aii Gwich'in have not be absorbed by a cash economy. Venetie and Arctic Village are distinctly native communities. Venetie, in particular, is not materially different today insofar as demographics from what it was when first observed in the early 1900s.

The Neets'aii Gwich'in are the modern-day successors to a historical sovereign entity.

Based upon its findings of fact, the court concludes that the Neets'aii Gwich'in are a sovereign tribe as a matter of law.

III. Adoptions

In their joint statement of issues, counsel for the parties agreed that the court should also try the issue of whether the Venetie Council and/or Tribal Government have exercised child custody authority over tribal members.

In *Native Village of Venetie*, 944 F.2d at 562, the Ninth Circuit Court concluded its decision reinstating the plaintiffs' complaint in the Adoption Case with the observation that:

> On remand, the district court must determine whether the native villages of Venetie and Fort Yukon are the modern-day successors to an historical sovereign band of native Americans. If the district court determines that either village is a successor to

> such a sovereign, it must provide the relief necessary to ensure that the state of Alaska affords full faith and credit to adoption decrees issued by the tribal courts of the native village.

Native Village of Venetie, 944 F.2d at 562.

As already noted, the parties submitted written briefs in lieu of oral argument after trial in this case. The briefs of the parties do not address the issue of whether the Venetie Council and Tribal Government have exercised child custody authority over tribal members. The court supposes that the parties may have concluded in the light of the ruling of the Ninth Circuit Court as quoted above, that a conclusion by this court that the Neets'aii Gwich'in are a sovereign tribe was dispositive of this final issue. Certainly the quoted words would appear to stand for the proposition that a sovereign tribe is entitled to exercise jurisdiction over child custody matters as between tribe members.

For sake of completeness, the court finds that the Venetie Council has established by a preponderance of the evidence that both the Council and the Tribal Government have exercised child custody (adoption) authority over tribal members. Narrative testimony of Maggie Roberts, ¶ 8, Trial testimony at 2-91; Narrative testimony of Moses Sam, ¶ 21; Narrative testimony of Ernest Erick, ¶ 11, Trial testimony at 4-44 to 4-50; Narrative testimony of Eddie Frank, ¶ 15. In his narrative testimony and at trial, Mr. Frank testified that both the Venetie Council and Tribal Government acted as courts in such matters. Narrative testimony of Eddie Frank, ¶ 17, Trial testimony at 4-97.

The trial testimony of Ernest Erick was particularly helpful in assisting the court in understanding the relationship between the Tribal Government and village councils with respect to adoption matters. The court had before it an order for adoption (voluntary) purportedly

entered in the Native Village of Venetie, Village Court in the matter of a child of Sherry Erick. Defendants' Exhibit DH. This order grants an adoption in favor of Adoption Case plaintiff, Nancy Joseph. Based upon Mr. Erick's testimony, the court finds that the Tribal Government has exercised authority over child custody matters such as adoptions of the children of tribe members. In some instances, however, as with voluntary adoptions, the Tribal Government delegates to the appropriate village council authority to grant adoptions on a case-by-case basis.

The court concludes that the State of Alaska must afford full faith and credit to adoption decrees issued by the tribal courts of the Neets'aii Gwich'in—that is, by the Native Village of Venetie Tribal Government sitting as a court or the Arctic Village or Native Village of Venetie councils sitting as a court.

Conclusion

The court concludes that neither the Arctic Village Council, the Native Village of Venetie I.R.A. Council, nor the Native Village of Venetie Tribal Government have been acknowledged as tribes by the United States Government. The court concludes that the Neets'aii Gwich'in are a sovereign tribe as a matter of common-law. The court concludes that the adoption decrees of the native courts of the Neets'aii Gwich'in tribe are entitled to full faith and credit from the State of Alaska.

DATED at Anchorage, Alaska, this 23rd day of December, 1994.

/s/ [Illegible]
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 87-4333

THE STATE OF ALASKA, ex rel.; YUKON FLATS SCHOOL DISTRICT; UNALAKLEET/NEESER CONSTRUCTION JV; UNALAKLEET NATIVE CORPORATION; NEESER CONSTRUCTION COMPANY; and GERALD NEESER,

Plaintiffs-Appellees,

v.

NATIVE VILLAGE OF VENETIE; VENETIE NATIVE COUNCIL; the VENETIE TAX COURT; the VENETIE TAX COMMISSION; GIDEON JAMES; LAWRENCE ROBERTS; LARRY WILLIAMS; ERNEST ERICK; LINCOLN TRITT; JOHN TITUS; and DAVID CASE,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Alaska

Argued and Submitted June 7, 1988.

Decided Sept. 9, 1988.

Before WRIGHT, FERGUSON and BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

I

The Village of Venetie ("Venetie") and Arctic Village are communities located in north-central Alaska, primarily inhabited by Native Alaskans. In 1940, Venetie reorganized under the Indian Reorganization Act of 1934 ("IRA"), ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 et seq.), forming both a constitutional governing body and a corporate body. Arctic Village did not reorganize.

In 1943, the Secretary of the Interior created a reservation out of approximately 1.8 million acres of land surrounding these villages. Congress revoked the reservation in 1971 by enacting § 19(a) of the Alaska Native Claims Settlement Act ("ANCSA"), Pub.L. No. 92-203, 85 Stat. 688, 710 (1971) (codified at 43 U.S.C. § 1618(a)). However, pursuant to § 19(b) of ANCSA, 43 U.S.C. § 1618(b), each village incorporated and acquired fee simple title to a portion of the former reservation land. Then, in 1978, the villages transferred title to the land to a joint governing body known as the Native Village of Venetie Tribal Government ("Native Village").

In 1978, Native Village adopted a five percent gross receipts tax on businesses operating upon its land. Due to the lack of commercial activity in the area, there was no opportunity to enforce the ordinance. This changed in 1986 when the State of Alaska ("State"), through one of its regional school districts, decided to construct an addition to the public high school in Venetie. While the State was soliciting bids from contractors, Native Village announced that it would impose the gross receipts tax on the contractor ultimately selected for the construction project.

The contract was awarded in February 1986, and construction commenced that summer. During the same period, Native Village replaced its gross receipts tax ordinance with a business activity tax ordinance. The new tax was levied in December, at which time the contractor was notified that it had incurred a liability of approximately $160,000. Neither the contractor nor the State paid the tax.

After Native Village had unsuccessfully attempted to collect the tax, the State informed Native Village that, as the real party in interest, it would challenge the tax in federal court. Native Village then filed a complaint in the Venetie Tax Court ("Native Court") against the State, the school district and the contractor ("appellees"). Rather than answer the complaint, appellees brought an action in the District of Alaska for declaratory and injunctive relief against Native Village, Venetie, the Native Court, and others ("appellants"). Appellees claimed that neither Native Village nor Venetie is an Indian tribe empowered to exercise tribal sovereignty, that neither entity exists on an Indian reservation, and therefore, that neither entity has jurisdiction to impose a tax on nonmembers. Appellants responded with a motion to dismiss, arguing that they are immune from suit by virtue of their tribal status, and that appellees have failed to exhaust tribal remedies.

On October 30, 1987, the district court reserved decision on the motion to dismiss. It did, however, decide preliminarily to enjoin appellants from further enforcement proceedings. On appeal, appellants challenge the merits of the preliminary injunction ruling, and also renew the substance of their motion to dismiss (which is still pending before the district court).

A district court's decision to grant a preliminary injunction should be reversed "only when the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact."

Colorado River Indian Tribes v. Town of Parker, 776 F.2d 846, 849 (9th Cir.1985).

II

Appellants first argue that the status of either Native Village or Venetie as an Indian tribe provides them with sovereign immunity, thereby depriving the district court of jurisdiction to entertain this action, even to the extent of granting a preliminary injunction.

Appellants accurately recognize that sovereign immunity is an incident of sovereign power, and that the sovereign power of an Indian community depends on its tribal status, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-59, 98 S. Ct. 1670, 1675-77, 56 L.Ed.2d 106 (1978); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1062-63 (1st Cir.1979). Their argument in favor of sovereign immunity assumes that either Native Village or Venetie has attained tribal status. However, appellees vigorously contest that issue. Thus, before we can conclude as to appellants' immunity from this action, we must determine whether Native Village or Venetie is a tribe for legal purposes.

Contrary to appellants' contention, this court's decision in *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir.1985), *cert. denied*, 474 U.S. 1055, 106 S.Ct. 793, 88 L.Ed.2d 771 (1986), did not hold that organization under the IRA is conclusive evidence of tribal status. In *Price*, the court merely stated that tribal status would be arguable in the event of IRA organization. *Id.* at 626. Also, amici have noted that the language of the IRA's Alaska amendment, 25 U.S.C. § 473a, raises doubt as to whether IRA organization should be construed so conclusively in the case of Alaskan Natives. Furthermore, much uncertainty exists concerning the structure of Native Village, Venetie, and Arctic Village that may have an impact on the IRA analysis.

If the IRA does not settle the matter, the inquiry would shift to whether Native Village or Venetie has been otherwise recognized as a tribe by the federal government. *See, e.g., Price*, 764 F.2d at 626-28. Failing there, tribal status may still be based on conclusions drawn from careful scrutiny of various historical factors. *See, e.g., Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582-88 (1st Cir.), *cert. denied*, 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 90 (1979).

Once tribal status is determined, other considerations arise. The sovereign immunity that naturally flows from tribal sovereignty will not be effective if it has been divested by Congress or otherwise lost by implication. *See United States v. Wheeler*, 435 U.S. 313, 322-26, 98 S.Ct. 1079, 1085-87, 55 L.Ed.2d 303 (1978); *Bottomly*, 599 F.2d at 1066. Nor will it be effective if it was waived during incorporation under the IRA. *See* W. Canby, *American Indian Law* 74-75 (1981). And even if the tribe and its instrumentalities are immune, the individual officers of the tribe will not be immune unless they were "acting in their representative capacity and within the scope of their authority." *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir.1985).

The district court recognized the complexity of the sovereign immunity question, and accordingly withheld its ruling pending "more study and a more carefully drawn decision." We will not attempt to decide this issue in the first instance, especially given the incomplete record that now exists. Appellants maintain that it would be a tremendous waste of judicial resources if the panel defers to the district court and the district court incorrectly concludes that there is no sovereign immunity. This is because the district court's decision would not be an appealable interlocutory order. We disagree. Rather than a waste, we believe that in this case it would be a necessary investment of judicial resources to develop a record and allow the district court to reach a decision as to its own jurisdiction.

The pendency of appellants' claim of sovereign immunity does not itself represent a bar to the district court's ability to impose a preliminary injunction. The district court was intent upon preserving the status quo in the face of appellants' motion to dismiss and the difficult question raised by the merits of the action. The Supreme Court has stated, in *United States v. United Mine Workers of America*, 330 U.S. 258, 293, 67 S.Ct. 677, 695, 91 L.Ed. 884 (1947), that the district court "had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief." *See also* 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3537 at 334 (1975). The Fifth (and later the Eleventh) Circuit has consistently echoed *United Mine Workers*. *See Fernandez-Roque v. Smith*, 671 F.2d 426, 431 (11th Cir.1982); *Stewart v. Dunn*, 363 F.2d 591, 598 (5th Cir.1966). We now do so as well.

Amici contend that a federal court should be barred from enjoining a parallel tribal court action just as it is barred from enjoining parallel state court actions. Even assuming that the Anti-Injunction Act pertains to tribal courts, the analogy made by amici is imperfect. There can be no question but that the fifty states of the Union are sovereign powers within our federalist system. But Indian communities can make no such claim. As we have outlined, not all Indian communities are considered tribes and therefore sovereign powers. The community in this case may not be sovereign. Until that uncertainty is resolved, amici's contention is premature.

Consequently, the district court did not act beyond its authority when it enjoined appellants.

III

Appellants also argue that this action should be dismissed because appellees have failed to exhaust available remedies in the Native Court. They principally rely on *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d

818 (1985), and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987).

In *National Farmers*, the court announced the doctrine that examination of a tribal court's civil subject-matter jurisdiction "should be conducted in the first instance in the Tribal Court itself." 471 U.S. at 856, 105 S.Ct. at 2454. The *LaPlante* Court reiterated this doctrine, explaining that "[e]xhaustion is required as a matter of comity. . . ." 107 S.Ct. at 976 n. 8. Even a cursory reading of these two opinions reveals that the comity arises out of the "attributes of sovereignty" possessed by Indian tribes, their "inherent powers" of self-government, and the "vital role" of tribal courts in that process. *See National Farmers*, 471 U.S. at 851, 856, 105 S.Ct. at 2451, 2454; *LaPlante*, 107 S.Ct. at 975-78. Thus, before the exhaustion question can be addressed, the sovereignty question first must be resolved.

In the present case, appellants' exhaustion argument similarly assumes that either Native Village or Venetie has attained tribal status, and therefore sovereignty. As we have previously discussed, there is a serious dispute in this action on the issue of tribal status, and the district court has reserved its judgment. Here, as above, we have neither the inclination nor the necessary record to decide this issue in the first instance.

We therefore hold that at this stage of the litigation, the district court was not bound to require appellees to exhaust remedies available in the Native Court.

IV

Finally, appellants argue that the district court abused its discretion in imposing a preliminary injunction upon their enforcement of the tax ordinance at issue.

Traditionally, there are four factors to be considered before a court decides to grant or deny preliminary injunctive relief:

1) The likelihood of the plaintiff's success on the merits;

2) the threat of irreparable harm to the plaintiff if the injunction is not imposed;

3) the relative balance of this harm to the plaintiff and the harm to the defendant if the injunction is imposed; and,

4) the public interest.

See Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980); 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2948 at 430-31 (1973).

In *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 551 (9th Cir.1977), this court treated factors two and three above as a single factor (*citing Alpine Lakes Protection Society v. Schlapfer*, 518 F.2d 1089, 1090 (9th Cir.1975)), and further noted that factor four is but one more interest to be balanced along with the interests of the parties. *Id.* Thus, there essentially are only two factors to be considered: The likelihood of the plaintiff's success on the merits; and, the relative balance of potential hardships to the plaintiff, defendant, and public.

These two factors have been employed in a test framed in the alternative. Basically, plaintiffs are entitled to preliminary injunctive relief if:

1) They demonstrate
   - a probable success on the merits, and
   - a possibility of irreparable injury;

2) or if they demonstrate
   - a fair chance of success on the merits (*i.e.*, serious questions are raised, and
   - the balance of hardships tips sharply in their favor.

See Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983); *Miss Universe, Inc. v. Flesher*, 605 F.2d 1130, 1134 (9th Cir.1979); *William Inglis & Sons Baking Company v. ITT Continental Baking Company, Inc.*, 526 F.2d 86, 88 (9th Cir.1975).

It is settled that the alternatives in the above test are not to be treated as two separate tests, but rather, as "extremes of a single continuum." *Benda v. Grand Lodge of International Association of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir.1978), *cert. dismissed*, 441 U.S. 937, 99 S.Ct. 2065, 60 L.Ed.2d 667 (1979). The proper approach is best summarized as follows:

> The critical element in determining the test to be applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly. *Aguirre v. Chula Vista Sanitary Service*, 542 F.2d 779 (9th Cir.1976).

Id.; see also Inglis, 526 F.2d at 88.

Focusing initially on the harm that appellees would suffer in the absence of injunctive relief, the district court was persuaded by two arguments. First, it was persuaded that the other 200 native villages in Alaska would be prompted to engage in similar taxation which would create tremendous uncertainty and difficulty for the State and other businesses providing services to those villages. Second, it was persuaded that if appellees paid the alleged tax liability and litigated in the Native Court, the amount paid would be unavailable for reimbursement if appellees ultimately prevailed.

The first argument is persuasive in light of the posture of this action and political realities in the State. We note, as did the parties and the district court, that this action presents a question of first impression. One amicus brief

informs us of at least one similar action pending in the District of Alaska. *See Alyeska Pipeline Service Co. v. Kluti Kaah Native Village of Copper Center*, No. A87-201 Civil (D.Alaska). The other amicus briefs informs us that it was filed on behalf of over 180 Native Alaskan Communities that "have a vital interest in the issues presented in this appeal." Thus, the district court was acknowledging obvious and substantial developments in the area of Native Alaskan taxation, and the high profile of this particular action. It is not unrealistic to conclude that a decision denying this preliminary injunction would add fuel to the engines of Native Alaskan taxation, have a chilling effect on potential contractors, and subject the State to a significant financial burden (as a result of either paying the future levies or litigating their validity).

The second argument is equally compelling. As a poor community, Native Village probably has many immediate uses for its first tax revenue. The non-existence of other taxable commercial ventures within the former Reservation indicates that expenditures from the tax fund will not be offset by future revenue. Thus, if it became necessary to reimburse appellees, it is highly unlikely that Native Village would be able to do so, even in the face of a federal court order. Alternatively, if appellees ignored the Native Court proceeding, their property would be exposed to attachment following the entry of a default judgment against them.

On the other hand, we agree with the district court that appellants will suffer no measurable hardship. This is a new tax ordinance that has never been a source of revenue. Appellees simply are not dependent on the ordinance or the particular levy in this case. At best they may have the $160,000 earmarked to alleviate existing hardships in their community. But these hardships are not the result of the district court's preliminary injunction.

As to the public interest, we believe it favors this preliminary injunction. Certainly, public policy encourages

tribal courts as part of the self-determination of Indian tribes. *See LaPlante*, 107 S.Ct. at 977. It also encourages exhaustion of tribal remedies. *Id.* However, these policies would not be furthered if an Indian community, which is not a sovereign tribe, exercises powers that it clearly does not possess. Therefore, until it is decided that either Native Village or Venetie is a sovereign tribe, proceedings in the Native Court could not be in the public interest.

Furthermore, judicial economy is always a policy consideration. If appellants ultimately prevail in federal court on the tribal-status question, the most they could lose by virtue of this injunction is time (assuming that exhaustion would then be required). On the other hand, if appellants do not prevail on that question, this injunction will have saved them an unnecessary drain on the tribal judicial system. The public interest seems best served by minimizing the potential loss and imposing the injunction.

Consequently, we see the balance of hardships and interests tipping decidedly in favor of appellees and the injunction. The next consideration is the likelihood of appellees success on the merits.

The merits of this action concern whether appellants have jurisdiction to tax appellees' business activities in Native Village. The power to tax "is an inherent and essential part of the authority of any government. The power is therefore an aspect of the retained sovereignty of Indian tribes except where it has been limited or withdrawn by federal authority." F. Cohen, *Handbook on Federal Indian Law* 431 (1982) (footnote omitted). A tribe exercises its sovereign governmental authority within its tribal territory. The governing legal term for tribal territory is "Indian country." *Id.* at 27. Thus, it follows that a tribal tax is only valid within the confines of Indian country.

Congress has defined Indian country as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian *reservation* under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all *dependent Indian communities* within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian *allotments*, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (emphasis added). This definition applies to both criminal and civil jurisdiction. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 1087 n. 5, 94 L.Ed.2d 244 (1987). Appellants concede that their land is not a reservation, and they make no claim to an allotment. Rather, they argue that either Native Village or Venetie is a dependent Indian community.

The term "dependent Indian community" was included in § 1151 in response to the Supreme Court's opinions in *United States v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913), and *United States v. McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1937). *See* Reviser's Note, 1948 Act, 18 U.S.C.A. § 1151 (1984). In those cases, the Court held that the non-reservation Indian communities in question were sufficiently similar to reservation Indian communities to be included within the meaning of Indian country. The decisions turned on the dependent nature of the communities and the federal government's role as regulator and protector of those communities. *See Sandoval*, 231 U.S. at 48, 34 S.Ct. at 6; *McGowan*, 302 U.S. at 537-39, 58 S.Ct. at 287-88. In one case, the community land was owned in fee simple by the Tribe, *see Sandoval*, 231 U.S. at 48, 34 S.Ct. at 6,

and in the other case, title was held by the federal government. *See McGowan*, 302 U.S. at 539, 58 S.Ct. at 288.

The Supreme Court has not returned to this question since the enactment of § 1151. However, three circuits have done so. *See United States v. Azure*, 801 F.2d 336, 339 (8th Cir.1986); *United States v. Levesque*, 681 F.2d 75, 77-79 (1st Cir.), *cert. denied*, 459 U.S. 1089, 103 S.Ct. 574, 74 L.Ed.2d 936 (1982); *United States v. South Dakota*, 665 F.2d 837, 839-43 (8th Cir.1981), *cert. denied*, 459 U.S. 823, 103 S.Ct. 52, 74 L.Ed.2d 58 (1982); *Weddel v. Meierhenry*, 636 F.2d 211, 212-13 (8th Cir. 1980), *cert. denied*, 451 U.S. 941, 101 S.Ct. 2024, 68 L.Ed.2d 329 (1981); *United States v. Martine*, 442 F.2d 1022, 1023-24 (10th Cir.1971). Two very similar analyses have emerged from these cases—the *Martine* approach and the *South Dakota* approach.

In *Martine*, the Tenth Circuit approved a three-pronged analysis, considering:

> 1) the nature of the area;
>
> 2) the relationship of the area inhabitants to Indian tribes and the federal government; and,
>
> 3) the established practice of government agencies toward that area.

442 F.2d at 1023. In *South Dakota*, the Eighth Circuit applied a more extensive analysis, including the *Martine* considerations as well as:

> 1) the degree of federal ownership of and control over the area;
>
> 2) the degree of cohesiveness of the area inhabitants; and,
>
> 3) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples.

665 F.2d at 839.

As these approaches illustrate, the ultimate conclusion as to whether an Indian community is Indian country is quite factually dependent. It is also dependent on whether the inhabitants constitute a tribe for legal purposes, which, as we discussed earlier, is another complex factual question. Because the record in the present case is so undeveloped, we cannot form an opinion on the merits, and like the district court, we cannot determine which party will probably succeed on the merits. However, in light of the large number of similar Native Alaskan communities in Alaska, this is a very important case raising far-reaching issues.

Because the balance of hardships tips decidedly in appellees' favor, and because serious questions are raised on the merits, the district court did not abuse its discretion in granting appellees preliminary injunctive relief. Accordingly, we affirm the district court's decision.

AFFIRMED.

APPENDIX E

MINUTES OF THE UNITED STATES DISTRICT COURT DISTRICT OF ALASKA

Case No. F87-51 Civil
THE HONORABLE ANDREW J. KLEINFELD

THE STATE OF ALASKA, EX REL, *et al.*

vs.

NATIVE VILLAGE OF VENETIE, *et al.*

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* * * *

PROCEEDINGS: ORAL ARGUMENT ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND DEFENDANTS' MOTION TO DISMISS:

Court convened at 2:30 p.m.

Statements of Court and counsel heard.

MOTION to dismiss RESERVED by the Court pending further study.

MOTION for preliminary injunction GRANTED except for taxes imposed on members living in the territorial limits and for airport landing fees.

Court heard arguments on case A85-503 Civil.

Mr. Mertz counsel agreed to delay action on A85-503 Civil to give Mr. Aschenbrenner time to file appeal.

Court recessed at 4:15 p.m.

Date: October 30, 1987 Deputy Clerk's initials: RJW

APPENDIX F

[Filed Jan. 23, 1997]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-35042
DC No. CV-87-00051-HRH

STATE OF ALASKA *ex rel.* YUKON FLATS SCHOOL DISTRICT, UNALAKLEET/NEESER CONSTRUCTION JV, UNALAKLEET NATIVE CORPORATION, NEESER CONSTRUCTION COMPANY, and GERALD NEESER,
Plaintiffs-Appellees,

-v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, a/k/a THE NATIVE VILLAGE OF VENETIE, THE VENETIE TAX COURT, THE VENETIE TAX COMMISSION, GIDEON JAMES, LAWRENCE ROBERTS, LARRY WILLIAMS, ERNEST ERICK, LINCOLN TRITT, JOHN TITUS, and DAVID CASE,
Defendants-Appellants.

ORDER

Before: BROWNING, D.W. NELSON and FERNANDEZ, Circuit Judges.

The State of Alaska's Unopposed Motion to Stay Issuance of the Mandate until final disposition by the United States Supreme Court is hereby GRANTED.

APPENDIX G

[Filed Jan. 6, 1997]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-35042
DC No. CV-87-00051-HRH

STATE OF ALASKA *ex rel.* YUKON FLATS SCHOOL DISTRICT, UNALAKLEET/NEESER CONSTRUCTION JV, UNALAKLEET NATIVE CORPORATION, NEESER CONSTRUCTION COMPANY, and GERALD NEESER,
Plaintiffs-Appellees,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, a/k/a THE NATIVE VILLAGE OF VENETIE, THE VENETIE TAX COURT, THE VENETIE TAX COMMISSION, GIDEON JAMES, LAWRENCE ROBERTS, LARRY WILLIAMS, ERNEST ERICK, LINCOLN TRITT, JOHN TITUS, and DAVID CASE,
Defendants-Appellants.

ORDER

Before: BROWNING, D.W. NELSON and FERNANDEZ, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judges Browning and Fernandez voted to reject the suggestion for rehearing en banc, and Judge D.W. Nelson so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX H

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1151 provides:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

43 U.S.C. § 1601 provides:

Congress finds and declares that—

(a) there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims;

(b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska;

(c) no provision of this chapter shall replace or diminish any right, privilege or obligation of Natives as citizens

of the United States or of Alaska, or relieve, replace, or diminish any obligation of the United States or of the State or Alaska to protect and promote the rights or welfare of Natives as citizens of the United States or of Alaska; the Secretary is authorized and directed, together with other appropriate agencies of the United States Government, to make a study of all Federal programs primarily designed to benefit Native people and to report back to the Congress with his recommendations for the future management and operation of these programs within three years of December 18, 1971;

(d) no provision of this chapter shall constitute a precedent for reopening, renegotiating, or legislating upon any past settlement involving land claims or other matters with any Native organizations, or any tribe, band, or identifiable group of American Indians;

(e) no provision of this chapter shall effect a change or changes in the petroleum reserve policy reflected in sections 7421 through 7438 of title 10 except as specifically provided in this chapter;

(f) no provision of this chapter shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, nor to grant implied consent to Natives to sue the United States or any of its officers with respect to the claims extinguished by the operation of this chapter; and

(g) no provision of this chapter shall be construed to terminate or otherwise curtail the activities of the Economic Development Administration or other Federal agencies conducting loan or loan and grant programs in Alaska. For this purpose only, the terms "Indian reservation" and "trust or restricted Indian-owned land areas" in Public Law 89-136, the Public Works and Economic Development Act of 1965, as amended [42 U.S.C. 3121 et seq.], shall be interpreted to include lands granted to Natives under this chapter as long as such lands remain in the ownership of the Native Villages or the Regional Corporations.

43 U.S.C. § 1603 provides:

(a) Aboriginal title extinguishment through prior land and water area conveyances

All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(b) Aboriginal title and claim extinguishment where based on use and occupancy; submerged lands underneath inland and offshore water areas and hunting or fishing rights included

All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

(c) Aboriginal claim extinguishment where based on right, title, use, or occupancy of land or water areas; domestic statute or treaty relating to use and occupancy; or foreign laws; pending claims

All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

43 U.S.C. § 1606 provides:

(a) Division of Alaska into twelve geographic regions; common heritage and common interest of region; area of region commensurate with operations of Native association; boundary disputes, arbitration

For purposes of this chapter, the State of Alaska shall be divided by the Secretary within one year after December 18, 1971, into twelve geographic regions, with each region composed as far as practicable of Natives having a common heritage and sharing common interests. In the absence of good cause shown to the contrary, such regions shall approximate the areas covered by the operations of the following existing Native associations:

(1) Arctic Slope Native Association (Barrow, Point Hope);

(2) Bering Straits Association (Seward Peninsula, Unalakleet, Saint Lawrence Island);

(3) Northwest Alaska Native Association (Kotzebue);

(4) Association of Village Council Presidents (southwest coast, all villages in the Bethel area, including all villages on the Lower Yukon River and the Lower Kuskokwim River);

(5) Tanana Chiefs' Conference (Koyukuk, Middle and Upper Yukon Rivers, Upper Kuskokwim, Tanana River);

(6) Cook Inlet Association (Kenai, Tyonek, Eklutna, Iliamna);

(7) Bristol Bay Native Association (Dillingham, Upper Alaska Peninsula);

(8) Aleut League (Aleutian Islands, Pribilof Islands and that part of the Alaska Peninsula which is in the Aleut League);

(9) Chugach Native Association (Cordova, Tatitlek, Port Graham, English Bay, Valdez, and Seward);

(10) Tlingit-Haida Central Council (southeastern Alaska, including Metlakatla);

(11) Kodiak Area Native Association (all villages on and around Kodiak Island); and

(12) Copper River Native Association (Copper Center, Glennallen, Chitina, Mentasta).

Any dispute over the boundaries of a region or regions shall be resolved by a board of arbitrators consisting of one person selected by each of the Native associations involved, and an additional one or two persons, whichever is needed to make an odd number of arbitrators, such additional person or persons to be selected by the arbitrators selected by the Native associations involved.

(b) Region mergers; limitation

The Secretary may, on request made within one year of December 18, 1971, by representative and responsible leaders of the Native associations listed in subsection (a) of this section, merge two or more of the twelve regions: *Provided*, That the twelve regions may not be reduced to less than seven, and there may be no fewer than seven Regional Corporations.

(c) Establishment of thirteenth region for nonresident Natives; majority vote; Regional Corporation for thirteenth region

If a majority of all eligible Natives eighteen years of age or older who are not permanent residents of Alaska elect, pursuant to section 1604(c) of this title, to be enrolled in a thirteenth region for Natives who are nonresidents of Alaska, the Secretary shall establish such a region for the benefit of the Natives who elected to be enrolled therein, and they may establish a Regional Corporation pursuant to this chapter.

(d) Incorporation; business for profit; eligibility for benefits; provisions in articles for carrying out chapter

Five incorporators within each region, named by the Native association in the region, shall incorporate under the laws of Alaska a Regional Corporation to conduct business for profit, which shall be eligible for the benefits of this chapter so long as it is organized and functions in accordance with this chapter. The articles of incorporation shall include provisions necessary to carry out the terms of this chapter.

(e) Original articles and bylaws: approval by Secretary prior to filing, submission for approval; amendments to articles: approval by Secretary; withholding approval in event of creation of inequities among Native individuals or groups

The original articles of incorporation and bylaws shall be approved by the Secretary before they are filed, and they shall be submitted for approval within eighteen months after December 18, 1971. The articles of incorporation may not be amended during the Regional Corporation's first five years without the approval of the Secretary. The Secretary may withhold approval under this section if in his judgment inequities among Native individuals or groups of Native individuals would be created.

(f) Board of directors; management; stockholders; provisions in articles or bylaws for number, term, and method of election

The management of the Regional Corporation shall be vested in a board of directors, all of whom, with the exception of the initial board, shall be stockholders over the age of eighteen. The number, terms, and method of election of members of the board of directors shall be fixed in the articles of incorporation or bylaws of the Regional Corporation.

(g) Issuance of stock

(1) Settlement Common Stock

(A) The Regional Corporation shall be authorized to issue such number of shares of Settlement Common Stock (divided into such classes as may be specified in the articles of incorporation to reflect the provisions of this chapter) as may be needed to issue one hundred shares of stock to each Native enrolled in the region pursuant to section 1604 of this title.

(B)(i) A Regional Corporation may amend its articles of incorporation to authorize the issuance of additional shares of Settlement Common Stock to—

(I) Natives born after December 18, 1971, and, at the further option of the Corporation, descendants of Natives born after December 18, 1971,

(II) Natives who were eligible for enrollment pursuant to section 1604 of this title but were not so enrolled, or

(III) Natives who have attained the age of 65,

for no consideration or for such consideration and upon such terms and conditions as may be specified in such amendment or in a resolution approved by the board of directors pursuant to authority expressly vested in the board by the amendment. The amendment to the articles of incorporation may specify which class of Settlement Common Stock shall be issued to the various groups of Natives.

(ii) Not more than one hundred shares of Settlement Common Stock shall be issued to any one individual pursuant to clause (i).

(iii) The amendment authorized by clause (i) may provide that Settlement Common Stock issued to a Native pursuant to such amendment (or stock issued in exchange for such Settlement Common Stock pursuant to subsection (h)(3) of this section or section 1629c(d) of this title) shall be deemed canceled upon the death of such Native. No compensation for this cancellation shall be paid to the estate of the deceased Native or to any person holding the stock.

(iv) Settlement Common Stock issued pursuant to clause (i) shall not carry rights to share in distributions made to shareholders pursuant to subsections (j) and (m) of this section unless, prior to the issuance of such stock, a majority of the class of existing holders of Settlement Common Stock carrying such rights separately approve the granting of such rights. The articles of incorporation of the Regional Corporation shall be deemed to be amended to authorize such class vote.

(C)(i) A Regional Corporation may amend its articles of incorporation to authorize the issuance of additional shares of Settlement Common Stock as a dividend or other distribution (without regard to surplus of the corporation under the laws of the State) upon each outstanding share of Settlement Common Stock issued pursuant to subparagraphs (A) and (B).

(ii) The amendment authorized by clause (i) may provide that shares of Settlement Common Stock issued as a dividend or other distribution shall constitute a separate class of stock with greater per share voting power than Settlement Common Stock issued pursuant to subparagraphs (A) and (B).

(2) Other forms of stock

(A) A Regional Corporation may amend its articles of incorporation to authorize the issuance of

shares of stock other than Settlement Common Stock in accordance with the provisions of this paragraph. Such amendment may provide that—

(i) preemptive rights of shareholders under the laws of the State shall not apply to the issuance of such shares, or

(ii) issuance of such shares shall permanently preclude the corporation from—

(I) conveying assets to a Settlement Trust, or

(II) issuing shares of stock without adequate consideration as required under the laws of the State.

(B) The amendment authorized by subparagraph (A) may provide that the stock to be issued shall be one or more of the following—

(i) divided into classes and series within classes, with preferences, limitations, and relative rights, including, without limitation—

(I) dividend rights,

(II) voting rights, and

(III) liquidation preferences;

(ii) made subject to one or more of—

(I) the restrictions on alienation described in clauses (i), (ii), and (iv) of subsection (h)(1)(B) of this section, and

(II) the restriction described in paragraph (1)(B)(iii); and

(iii) restricted in issuance to—

(I) Natives who have attained the age of sixty-five;

(II) other identifiable groups of Natives or identifiable groups of descendants of Natives defined in terms of general applicability and not in any way by reference to place of residence or family;

(III) Settlement Trusts; or

(IV) entities established for the sole benefit of Natives or descendants of Natives, in which the classes of beneficiaries are defined in terms of general applicability and not in any way by reference to place of residence, family, or position as an officer, director, or employee of a Native Corporation.

(C) The amendment authorized by subparagraph (A) shall provide that the additional shares of stock shall be issued—

(i) as a dividend or other distribution (without regard to surplus of the corporation under the laws of the State) upon all outstanding shares of stock of any class or series, or

(ii) for such consideration as may be permitted by law (except that this requirement may be waived with respect to issuance of stock to the individuals or entities described in subparagraph (B)(iii)).

(D) During any period in which alienability restrictions are in effect, no stock whose issuance is authorized by subparagraph (A) shall be—

(i) issued to, or for the benefit of, a group of individuals composed only or principally of employees, officers, and directors of the corporation; or

(ii) issued more than thirteen months after the date on which the vote of the shareholders

on the amendment authorizing the issuance of such stock occurred if, as a result of the issuance, the outstanding shares of Settlement Common Stock will represent less than a majority of the total voting power of the corporation for the purpose of electing directors.

(3) Disclosure requirements

(A) An amendment to the articles of incorporation of a Regional Corporation authorized by paragraph (2) shall specify—

(i) the maximum number of shares of any class or series of stock that may be issued, and

(ii) the maximum number of votes that may be held by such shares.

(B)(i) If the board of directors of a Regional Corporation intends to propose an amendment pursuant to paragraph (2) which would authorize the issuance of classes or series of stock that, singly or in combination, could cause the outstanding shares of Settlement Common Stock to represent less than a majority of the total voting power of the corporation for the purposes of electing directors, the shareholders of such corporation shall be expressly so informed.

(ii) Such information shall be transmitted to the shareholders in a separate disclosure statement or in another informational document in writing or in recorded sound form both in English and any Native language used by a shareholder of such corporation. Such statement or informational document shall be transmitted to the shareholders at least sixty days prior to the date on which such proposal is to be submitted for a vote.

(iii) If not later than thirty days after issuance of such disclosure statement or informational docu-

ment the board of directors receives a prepared concise statement setting forth arguments in opposition to the proposed amendment together with a request for distribution thereof signed by the holders of at least 10 per centum of the outstanding shares of Settlement Common Stock, the board shall either distribute such statement to the shareholders or provide to the requesting shareholders a list of all shareholder's names and addresses so that the requesting shareholders may distribute such statement.

(4) Savings

(A)(i) No shares of stock issued pursuant to paragraphs (1)(C) and (2) shall carry rights to share in distributions made to shareholders pursuant to subsections (j) and (m) of this section. No shares of stock issued pursuant to paragraph (1)(B) shall carry such rights unless authorized pursuant to paragraph (1)(B)(iv).

(ii) Notwithstanding the issuance of additional shares of stock pursuant to paragraphs (1)(B), (1)(C), or (2), a Regional Corporation shall apply the ratio last computed pursuant to subsection (m) of this section prior to February 3, 1988, for purposes of distributing funds pursuant to subsections (j) and (m) of this section.

(B) The issuance of additional shares of stock pursuant to paragraphss (1)(B), (1)(C), or (2) shall not affect the division and distribution of revenues pursuant to subsection (i) of this section.

(C) No provision of this chapter shall limit the right of a Regional Corporation to take an action authorized by the laws of the State unless such action is inconsistent with the provisions of this chapter.

(h) Settlement Common Stock

(1) Rights and restrictions

(A) Except as otherwise expressly provided in this chapter, Settlement Common Stock of a Regional Corporation shall—

(i) carry a right to vote in elections for the board of directors and on such other questions as properly may be presented to shareholders;

(ii) permit the holder to receive dividends or other distributions from the corporation; and

(iii) vest in the holder all rights of a shareholder in a business corporation organized under the laws of the State.

(B) Except as otherwise provided in this subsection, Settlement Common Stock, inchoate rights thereto, and rights to dividends or distributions declared with respect thereto shall not be—

(i) sold;

(ii) pledged;

(iii) subjected to a lien or judgment execution;

(iv) assigned in present or future;

(v) treated as an asset under—

(I) title 11 or any successor statute,

(II) any other insolvency or moratorium law, or

(III) other laws generally affecting creditors' rights; or

(vi) otherwise alienated.

(C) Notwithstanding the restrictions set forth in subparagraph (B), Settlement Common Stock may be transferred to a Native or a descendant of a Native—

(i) pursuant to a court decree of separation, divorce, or child support;

(ii) by a holder who is a member of a professional organization, association, or board that limits his or her ability to practice his or her profession because he or she holds Settlement Common Stock; or

(iii) as an inter vivos gift from a holder to his or her child, grandchild, great-grandchild, niece, nephew, or (if the holder has reached the age of majority as defined by the laws of the State of Alaska) brother or sister.

(2) Inheritance of Settlement Common Stock

(A) Upon the death of a holder of Settlement Common Stock, ownership of such stock (unless canceled in accordance with subsection (g)(1)(B)(iii) of this section) shall be transferred in accordance with the lawful will of such holder or pursuant to applicable laws of intestate succession. If the holder fails to dispose of his or her stock by will and has no heirs under applicable laws of intestate succession, the stock shall escheat to the issuing Regional Corporation and be canceled.

(B) The issuing Regional Corporation shall have the right to purchase at fair value Settlement Common Stock transferred pursuant to applicable laws of intestate succession to a person not a Native or a descendant of a Native after February 3, 1988, if—

(i) the corporation—

(I) amends its articles of incorporation to authorize such purchases, and

(II) gives the person receiving such stock written notice of its intent to purchase within ninety days after the date that

the corporation either determines the decedent's heirs in accordance with the laws of the State or receives notice that such heirs have been determined, whichever later occurs; and

(ii) the person receiving such stock fails to transfer the stock pursuant to paragraph (1)(C)(iii) within sixty days after receiving such written notice.

(C) Settlement Common Stock of a Regional Corporation—

(i) transferred by will or pursuant to applicable laws of intestate succession after February 3, 1988, or

(ii) transferred by any means prior to February 3, 1988,

to a person not a Native or a descendant of a Native shall not carry voting rights. If at a later date such stock is lawfully transferred to a Native or a descendant of a Native, voting rights shall be automatically restored.

(3) Replacement Common Stock

(A) On the date on which alienability restrictions terminate in accordance with the provisions of section 1629c of this title, all Settlement Common Stock previously issued by a Regional Corporation shall be deemed canceled, and shares of Replacement Common Stock of the appropriate class shall be issued to each shareholder, share for share, subject only to subparagraph (B) and to such restrictions consistent with this chapter as may be provided by the articles of incorporation of the corporation or in agreements between the corporation and individual shareholders.

(B)(i) Replacement Common Stock issued in exchange for Settlement Common Stock issued subject

to the restriction authorized by subsection (g)(1)(B)(iii) of this section shall bear a legend indicating that the stock will eventually be canceled in accordance with the requirements of that subsection.

(ii) Prior to the termination of alienability restrictions, the board of directors of the corporation shall approve a resolution to provide that each share of Settlement Common Stock carrying the right to share in distributions made to shareholders pursuant to subsections (j) and (m) of this section shall be exchanged either for—

(I) a share of Replacement Common Stock that carries such right, or

(II) a share of Replacement Common Stock that does not carry such right together with a separate, non-voting security that represents only such right.

(iii) Replacement Common Stock issued in exchange for a class of Settlement Common Stock carrying greater per share voting power than Settlement Common Stock issued pursuant to subsections (g)(1)(A) and (g)(1)(B) of this section shall carry such voting power and be subject to such other terms as may be provided in the amendment to the articles of incorporation authorizing the issuance of such class of Settlement Common Stock.

(C) The articles of incorporation of the Regional Corporation shall be deemed amended to authorize the issuance of Replacement Common Stock and the security described in subparagraph (B)(ii)(II).

(D) Prior to the date on which alienability restrictions terminate, a Regional Corporation may amend its articles of incorporation to impose upon Replacement Common Stock one or more of the following—

(i) a restriction denying voting rights to any holder of Replacement Common Stock who is not a Native or a descendant of a Native;

(ii) a restriction granting the Regional Corporation, or the Regional Corporation and members of the shareholder's immediate family who are Natives or descendants of Natives, the first right to purchase, on reasonable terms, the Replacement Common Stock of the shareholder prior to the sale or transfer of such stock (other than a transfer by will or intestate succession) to any other party, including a transfer in satisfaction of a lien, writ of attachment, judgment execution, pledge, or other encumbrance; and

(iii) any other term, restriction, limitation, or provision authorized by the laws of the State.

(E) Replacement Common Stock shall not be subjected to a lien or judgment execution based upon any asserted or unasserted legal obligation of the original recipient arising prior to the issuance of such stock.

(i) Certain natural resource revenues; distribution among twelve Regional Corporations; computation of amount; subsection inapplicable to thirteenth Regional Corporation

Seventy per centum of all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this chapter shall be divided annually by the Regional Corporation among all twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each region pursuant to section 1604 of this title. The provisions of this subsection shall not apply to the thirteenth Regional Corporation if organized pursuant to subsection (c) hereof.

(j) Corporate funds and other net income, distribution among: stockholders of Regional Corporations; Village Corporations and nonresident stockholders; and stockholders of thirteenth Regional Corporation

During the five years following December 18, 1971, not less than 10% of all corporate funds received by each of the twelve Regional Corporations under section 1605 of this title (Alaska Native Fund), and under subsection (i) of this section (revenues from the timber resources and subsurface estate patented to it pursuant to this chapter), and all other net income, shall be distributed among the stockholders of the twelve Regional Corporations. Not less than 45% of funds from such sources during the first five-year period, and 50% thereafter, shall be distributed among the Village Corporations in the region and the class of stockholders who are not residents of those villages, as provided in subsections to it. In the case of the thirteenth Regional Corporation, if organized, not less than 50% of all corporate funds received under section 1605 of this title shall be distributed to the stockholders.

(k) Distributions among Village Corporations; computation of amount

Funds distributed among the Village Corporations shall be divided among them according to the ratio that the number of shares of stock registered on the books of the Regional Corporation in the names of residents of each village bears to the number of shares of stock registered in the names of residents in all villages.

(*l*) Distributions to Village Corporations; village plan: withholding funds until submission of plan for use of money; joint ventures and joint financing of projects; disagreements, arbitration of issues as provided in articles of Regional Corporation

Funds distributed to a Village Corporation may be withheld until the village has submitted a plan for the use of the money that is satisfactory to the Regional Corporation. The Regional Corporation may require a village

plan to provide for joint ventures with other villages, and for joint financing of projects undertaken by the Regional Corporation that will benefit the region generally. In the event of disagreement over the provisions of the plan, the issues in disagreement shall be submitted to arbitration, as shall be provided for in the articles of incorporation of the Regional Corporation.

(m) Distributions among Village Corporations in a region; computation of dividends for nonresidents of village; financing regional projects with equitably withheld dividends and Village Corporation funds

When funds are distributed among Village Corporations in a region, an amount computed as follows shall be distributed as dividends to the class of stockholders who are not residents of those villages: The amount distributed as dividends shall bear the same ratio to the amount distributed among the Village Corporations that the number of shares of stock registered on the books of the Regional Corporation in the names of nonresidents of villages bears to the number of shares of stock registered in the names of village residents: *Provided*, That an equitable portion of the amount distributed as dividends may be withheld and combined with Village Corporation funds to finance projects that will benefit the region generally.

(n) Projects for Village Corporations

The Regional Corporation may undertake on behalf of one or more of the Village Corporations in the region any project authorized and financed by them.

(*o*) Annual audit; place; availability of papers, things, or property to auditors to facilitate audits; verification of transactions; report to stockholders

The accounts of the Regional Corporation shall be audited annually in accordance with generally accepted auditing standards by independent certified public accountants or independent licensed public accountants,

certified or licensed by a regulatory authority of the State or the United States. The audits shall be conducted at the place or places where the accounts of the Regional Corporation are normally kept. All books, accounts, financial records, reports, files, and other papers, things, or property belonging to or in use by the Regional Corporation and necessary to facilitate the audits shall be available to the person or persons conducting the audits; and full facilities for verifying transactions with the balances or securities held by depositories, fiscal agent, and custodians shall be afforded to such person or persons. Each audit report or a fair and reasonably detailed summary thereof shall be transmitted to each stockholder.

(p) Federal-State conflict of laws

In the event of any conflict between the provisions of this section and the laws of the State of Alaska, the provisions of this section shall prevail.

(q) Business management group; investment services contracts

Two or more Regional Corporations may contract with the same business management group for investment services and advice regarding the investment of corporate funds.

43 U.S.C. § 1607 provides:

(a) Organization of Corporation prerequisite to receipt of patent to lands or benefits under chapter

The Native residents of each Native village entitled to receive lands and benefits under this chapter shall organize as a business for profit or nonprofit corporation under the laws of the State before the Native village may receive patent to lands or benefits under this chapter, except as otherwise provided.

(b) Regional Corporation: approval of initial articles; review and approval of amendments to articles and annual budgets; assistance in preparation of articles and other documents

The initial articles of incorporation for each Village Corporation shall be subject to the approval of the Regional Corporation for the region in which the village is located. Amendments to the articles of incorporation and the annual budgets of the Village Corporations shall, for a period of five years, be subject to review and approval by the Regional Corporation. The Regional Corporation shall assist and advise Native villages in the preparation of articles of incorporation and other documents necessary to meet the requirements of this subsection.

(c) Applicability of section 1606

The provisions of subsections (g), (h), and (*o*) of section 1606 of this title shall apply in all respects to Village Corporations, Urban Corporations, and Group Corporations.

43 U.S.C. § 1611 provides:

(a) Acreage limitation; proximity of selections and size of sections and units; waiver

(1) During a period of three years from December 18, 1971, the Village Corporation for each Native village identified pursuant to section 1610 of this title shall select, in accordance with rules established by the Secretary, all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled under section 1613 of this title. The selection shall be made from lands withdrawn by section 1610(a) of this title: *Provided*, That no Village Corporation may select more than 69,120 acres from lands withdrawn by section 1610(a)(2) of this title, and not more than

69,120 acres from the National Wildlife Refuge System, and not more than 69,120 acres in a National Forest: *Provided further*, That when a Village Corporation selects the surface estate to lands within the National Wildlife Refuge System or Naval Petroleum Reserve Numbered 4, the Regional Corporation, for that region may select the subsurface estate in an equal acreage from other lands withdrawn in section 1610(a) of this title within the region, if possible.

(2) Selections made under this subsection (a) of this section shall be contiguous and in reasonably compact tracts, except as separated by bodies of water or by lands which are unavailable for selection, and shall be in whole sections and, wherever feasible, in units of not less than 1,280 acres: *Provided*, That the Secretary in his discretion and upon the request of the concerned Village Corporation, may waive the whole section requirement where—

(A)(i) a portion of available public lands of a section is separated from other available public lands in the same section by lands unavailable for selection or by a meanderable body of water;

(ii) such waiver will not result in small isolated parcels of available public land remaining after conveyance of selected lands to Native Corporations; and

(iii) such waiver would result in a better land ownership pattern or improved land or resource management opportunity; or

(B) the remaining available public lands in the section have been selected and will be conveyed to another Native Corporation under this chapter.

(b) Allocation; reallocation considerations

The difference between twenty-two million acres and the total acreage selected by Village Corporations pursuant to subsection (a) of this section shall be allocated by the Secretary among the eleven Regional Corporations (which excludes the Regional Corporation for southeastern Alaska) on the basis of the number of Natives enrolled in each region. Each Regional Corporation shall reallocate such acreage among the Native villages within the region on an equitable basis after considering historic use, subsistence needs, and population. The action of the Secretary or the Corporation shall not be subject to judicial review. Each Village Corporation shall select the acreage allocated to it from the lands withdrawn by section 1610(a) of this title.

(c) Computation

The difference between thirty-eight million acres and the 22 million acres selected by Village Corporations pursuant to subsections (a) and (b) of this section shall be allocated among the eleven Regional Corporations (which excludes the Regional Corporation for southeastern Alaska) as follows:

(1) The number of acres each Regional Corporation is entitled to receive shall be computed (A) by determining on the basis of available data the percentages of all lands in Alaska (excluding the southeastern region) that is within each of the eleven regions, (B) by applying that percentage to thirty-eight million acres reduced by the acreage in the southeastern region that is to be selected pursuant to section 1615 of this title, and (C) by deducting from the figure so computed the number of acres within that region selected pursuant to subsections (a) and (b) of this section.

(2) In the event that the total number of acres selected within a region pursuant to subsecitons (a) and (b) of the section exceeds the percentage of the reduced thirty-eight million acres allotted to that region pursuant to subsection (c)(1)(B) of this section, that region shall not be entitled to receive any lands under this subsection (c). For each region so affected the difference between

the acreage calculated pursuant to subsection (c)(1)(B) of this section and the acreage selected pursuant to subsections (a) and (b) of this section shall be deducted from the acreage calculated under subsection (c)(1)(C) of this section for the remaining regions which will select lands under this subsection (c). The reductions shall be apportioned among the remaining regions so that each region's share of the total reduction bears the same proportion to the total reduction as the total land area in that region (as calculated pursuant to subsection (c)(1)(A) of this section bears to the total land area in all of the regions whose allotments are to be reduced pursuant to this paragraph.

(3) Before the end of the fourth year after December 18, 1971, each Regional Corporation shall select the acreage allocated to it from the lands within the region withdrawn pursuant to section 1610(a)(1) of this title, and from the lands within the region withdrawn pursuant to section 1610(a)(3) of this title to the extent lands withdrawn pursuant to section 1610(a)(1) of this title are not sufficient to satisfy its allocation: *Provided*, That within the lands withdrawn by section 1610(a)(1) of this title the Regional Corporation may select only even numbered townships in even numbered ranges, and only odd numbered townships in odd numbered ranges.

(4) Where the public lands consist only of the mineral estate, or portion thereof, which is reserved by the United States upon patent of the balance of the estate under one of the public land laws, other than this chapter, the Regional Corporations may select as follows:

(A) Where such public lands were not withdrawn pursuant to section 1610(a)(3) of this title, but are surrounded by or contiguous to lands withdrawn pursuant to section 1610(a)(3) of this title, and filed upon for selection by a Regional Corporation, the Corporation may, upon request, have such public

land included in its selection and considered by the Secretary to be withdrawn and properly selected.

(B) Where such public lands were withdrawn pursuant to section 1610(a)(1) of this title and are required to be selected by paragraph (3) of this subsection, the Regional Corporation may, at its option, exclude such public lands from its selection.

(C) Where the Regional Corporation elects to obtain such public lands under subparagraph (A) or (B) of this paragraph, it may select, within ninety days of receipt of notice from the Secretary, the surface estate in an equal acreage from other public lands withdrawn by the Secretary for that purpose. Such selections shall be in units no smaller than a whole section, except where the remaining entitlement is less than six hundred and forty acres, or where an entire section is not available. Where possible, selections shall be of lands from which the subsurface estate was selected by that Regional Corporation pursuant to subsection (a)(1) of this section or section 1613(h)(9) of this title, and, where possible, all selections made under this section shall be contiguous to lands already selected by the Regional Corporation or a Village Corporation. The Secretary is authorized, as necessary, to withdraw up to two times the acreage entitlement of the in lieu surface estate from vacant, unappropriated, and unreserved public lands from which the Regional Corporation may select such in lieu surface estate except that the Secretary may withdraw public lands which had been previously withdrawn pursuant to subsection 1616(d)(1) of this title.

(D) No mineral estate or in lieu surface estate shall be available for selection within the National Petroleum Reserve—Alaska or within Wildlife Refuges as the boundaries of those refuges exist on December 18, 1971.

(d) Village Corporation for Native village at Dutch Harbor; lands and improvements and patent for Village Corporation

To insure that the Village Corporation for the Native village at Dutch Harbor, if found eligible for land grants under this chapter, has a full opportunity to select lands within and near the village, no federally owned lands, whether improved or not, shall be disposed of pursuant to the Federal surplus property disposal laws for a period of two years from December 18, 1971. The Village Corporation may select such lands and improvements and receive patent to them pursuant to section 1613(a) of this title.

(e) Disputes over land selection rights and boundaries; arbitration

Any dispute over the land selection rights and the boundaries of Village Corporations shall be resolved by a board of arbitrators consisting of one person selected by each of the Village Corporations involved, and an additional one or two persons, whichever is needed to make an odd number of arbitrators, such additional person or persons to be selected by the arbitrators selected by the Village Corporations.

43 U.S.C. § 1618 provides:

(a) Notwithstanding any other provision of law, and except where inconsistent with the provisions of this chapter, the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs, including those created under section 497 of title 25, are hereby revoked subject to any valid existing rights of non-Natives. This section shall not apply to the Annette Island Reserve established by section 495 of title 25 and no person enrolled in the Metlakatla Indian community of the Annette Island Reserve shall be eligible for benefits under this chapter.

(b) Notwithstanding any other provision of law or of this chapter, any Village Corporation or Corporations may elect within two years to acquire title to the surface and subsurface estates in any reserve set aside for the use or benefit of its stockholders or members prior to December 18, 1971. If two or more villages are located on such reserve, the election must be made by all of the members or stockholders of the Village Corporations concerned. In such event, the Secretary shall convey the land to the Village Corporation or Corporations, subject to valid existing rights as provided in section 1613(g) of this title, and the Village Corporation shall not be eligible for any other land selections under this chapter or to any distribution of Regional Corporations funds pursuant to section 1606 of this title, and the enrolled residents of the Village Corporation shall not be eligible to receive Regional Corporation stock.

43 U.S.C. § 1620(d) provides:

(d) Real property interests; exemption period for conveyance of interests not developed or leased or interests used solely for exploration, interests taxable; derivative revenues taxable; exchanges; simultaneous exchanges

(1) Real property interests conveyed, pursuant to this chapter, to a Native individual, Native Group, Village or Regional Corporation or corporation established pursuant to section 1613(h)(3) of this title which are not developed or leased to third parties or which are used solely for the purposes of exploration shall be exempt from State and local real property taxes for a period of twenty years from the vesting of title pursuant to the Alaska National Interest Lands Conservation Act or the date of issuance of an interim conveyance or patent, whichever is earlier, for those interests to such individual, group, or corporation: *Provided*, That municipal taxes, local real property taxes, or local assessments may be imposed upon any portion of such interest within the jurisdiction of any

governmental unit under the laws of the State which is leased or developed for purposes other than exploration for so long as such portion is leased or being developed: *Provided further*, That easements, rights-of-way, leaseholds, and similar interests in such real property may be taxed in accordance with State or local law. All rents, royalties, profits, and other revenues or proceeds derived from such property interests shall be taxable to the same extent as such revenues or proceeds are taxable when received by a non-Native individual or corporation.

(2) Any real property interest, not developed or leased to third parties, acquired by a Native individual, Native Group, Village or Regional Corporation, or corporation established pursuant to section 1613(h)(3) of this title in exchange for real property interests which are exempt from taxation pursuant to paragraph (1) of this subsection shall be deemed to be a property interest conveyed pursuant to this chapter and shall be exempt from taxation as if conveyed pursuant to this chapter, when such an exchange is made with the Federal Government, the State government, a municipal government, or another Native Corporation, or, if neither party to the exchange receives a cash value greater than 25 per centum of the value of the land exchanged, a private party. In the event that a Native Corporation simultaneously exchanges two or more tracts of land having different periods of tax exemption pursuant to this subsection, the periods of tax exemption for the exchanged lands received by such Native Corporation shall be determined (A) by calculating the percentage that the acreage of each tract given up bears to the total acreage given up, and (B) by applying such percentages and the related periods of tax exemption to the acreage received in exchange.

43 U.S.C. § 1624 provides:

The Secretary is authorized to issue and publish in the Federal Register, pursuant to subchapter II of chapter 5 of title 5, such regulations as may be necessary to carry out the purposes of this chapter.